ORIGINAL

Before The
Copyright Arbitration Royalty Panel
Copyright Office
Library Of Congress
Washington, D.C 20540

RECEIVED

SEP 5 2003

GENERAL COUNSEL
OF COPYRIGHT

Docket No. 2001-8 CARP-CD98-99

In the Matter of
Distribution of 1998 and 1999
Cable Royalty Funds

REPLY PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION
OF BROADCASTERS

John I. Stewart, Jr.
Parul Desai
Michael Lazarus

CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2500

Its Counsel

Of Counsel:

Henry L. Baumann, Esq.
Bart Stringham, Esq.

National Association of
Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

September 5th, 2003

TABLE OF CONTENTS

Before the
COPYRIGHT ARBITRATION ROYALTY PANEL
Washington, D.C. 20540

In the Matter of Distribution of 1998 and 1999 Cable Royalty Funds	)	Docket No. 2001-8 CARP-CD 98-99

PHASE I REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE COMMERCIAL TELEVISION CLAIMANTS

The National Association of Broadcasters (NAB), on behalf of all U.S. Commercial Television station claimants, by its attorneys, submits these reply findings of fact and conclusions of law in the Phase I evidentiary proceedings concerning distribution of the 1998-1999 cable copyright royalty funds.

I. INTRODUCTION

The proposed findings and conclusions of the parties in this proceeding[1] are in general agreement that, based on CARP and CRT precedent developed over the

---

1 Such pleadings will be referred to in this Reply as, for example, "PS PF at ¶ ___" for the specified paragraph of Program Suppliers Proposed Findings, and "PS PCL at ___" for the specified page of the Program Suppliers Proposed Conclusions of Law.

years in which these proceedings have been taking place, the criterion for the Panel's allocation determinations should be to ascertain the relative market value of the works actually carried on distant signals in 1998 and 1999. And most of the parties also discuss and seek to apply the Bortz survey and Nielsen viewing study quantitative evidence that have for many years been the two "centerpieces" of CRT and CARP distribution proceedings.

Yet, oddly, the sponsors of these two studies spend much of their proposed findings explaining how their own quantitative studies should not be relied on in setting the shares of the other parties. In particular, the Program Suppliers and the Joint Sports Claimants propose and attempt to justify qualifications and adjustments to their own studies that are designed to reduce the share of the Commercial Television claimants, in the face of overwhelming evidence that Commercial Television's share should be substantially increased.

Program Suppliers attempt to rely on yet another version of Dr. Gruen's so-called "avidity" adjustment to cut back the Commercial Television viewing share and boost their own. As it turns out, their newest version still makes fundamental calculation errors, and when those are corrected, the result is an increase in the Commercial Television share. But Program Suppliers do not even limit themselves to manipulations of the quantitative evidence. Their ultimate proposal for the

Commercial Television award simply picks a number out of thin air, by way of an unexplained "further downward adjustment."

JSC also confect their proposal for a Commercial Television award out of thin air, but at least they spin out a superficially imaginative chain of quantitative suppositions to arrive at a number. The JSC proposal also suffers, however, from being totally unsupported by logic or the record evidence and inconsistent with JSC's arguments for their own share.

In the end, the proposed findings of Program Suppliers and JSC are profoundly unhelpful to the Panel and the process. By declining to provide proposed shares that add up to 100% for all the parties, and instead focusing on maximizing their own claims, these claimants have provided massive amounts of material and argument that are not ultimately useful in accomplishing the task the Panel faces. Merely compiling a welter of subjective and anecdotal points about the supposed lack of value of other claimants' programs is meaningless and diversionary. The Panel must determine awards for all the parties that fall within the "zone of reasonableness" set by the quantitative evidence in the record.[2] Its ultimate

---

[2] Cf. Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295, 1304 (D.C. Cir. 1983).

objective should be to set awards that are fair and consistent in light of the two "centerpiece" quantitative studies, and fully supported by valid record evidence.

Based on substantial record evidence of changed circumstances in the distant signal marketplace as well as quantitative and qualitative record evidence under the marketplace value criterion, the Commercial Television award should be increased significantly over the last litigated award. As NAB set out in its own Proposed Findings of Fact and Conclusions of Law, the shares of the parties should be based principally on the Bortz survey results, but these shares are also consistent with the viewing study results as well as the other record evidence.

II. REPLY TO PROPOSED FINDINGS OF PROGRAM SUPPLIERS, JOINT SPORTS CLAIMANTS, AND MUSIC CLAIMANTS

Following are replies to the proposed findings of two other claimant groups who have proposed a reduced royalty share for Commercial Television, and to the proposed findings of the Music Claimants regarding their own share.

A. THE PROGRAM SUPPLIERS CLAIMANTS

1. Program Suppliers propose inflated royalty shares for themselves (72% of Basic and 78.5% of 3.75), and actually propose reduced shares for NAB (6.8% of Basic and 8.24% of 3.75) compared with the 1990-1992 awards.[3] These numbers are essentially pulled out of thin air. Program Suppliers discuss their proposed allocation standards and comment on certain of the evidence, but none of these arguments or evidence support the shares they actually propose.

2. The version of the "marketplace value" standard Program Suppliers urge on the Panel is flawed and unusable. Their standard misapprehends the purpose of the marketplace value standard and ignores the fundamental differences between distant signals and cable networks. Its exclusive focus on viewing by a single demographic group is unjustifiable.

---

3 PS PCL at Introduction, 190, 211-212.

3. Despite the fact that essentially every one of Program Suppliers' witnesses urges the Panel to rely on the reported viewing shares, Program Suppliers contradictorily propose following Dr. Gruen's misguided and misapplied "avidity" adjustment in calculating the shares. They assert in their Proposed Findings that "[i]t is a relatively simple exercise to analyze program availability and viewing to determine if there is a relationship between the two that sheds light on the issue of value" in the distant signal context.[4] But in re-attempting this "simple exercise," Program Suppliers still miscalculate their own adjustment, again comparing apples to oranges.[5] If done properly, the newest version of the "avidity" adjustment they now present would actually result in an increase of the NAB viewing share and a decrease in the Program Suppliers share.

4. Although Program Suppliers propose shares for only five of the six parties to this proceeding, and purport to take no position on an award to the Joint Sports Claimants,[6] the Panel must make awards to all of the parties in this case, totaling 100%. The shares proposed by the Program Suppliers, given their hugely inflated percentages for themselves, leave 1998/1999 shares for the Joint Sports Claimants of only 13.58%/13.41% of the Basic Fund and 10.82%/10.66% of the 3.75

---

4 Id. at 169-170.

5 Id. at 169-175; see NAB PF at ¶¶ 96-97.

6 PS PF at Introduction & n.1.

Fund.[7] There is no support whatsoever in the record for halving the Sports award and actually reducing the Commercial Television share below its 1990-1992 award while boosting the Program Suppliers' award by nearly 20 percentage points. The record, in fact, is overwhelmingly to the contrary.

1. The Marketplace Value Standard

5. Program Suppliers' biggest problem in this case is somehow to avoid the obvious implication of the fact that their viewing share in their own 1998-1999 study plummeted well below 80% for the first time since the commencement of these proceedings.[8] Program Suppliers' attempt to solve their problem – arguing that the standard should focus on evidence about cable networks rather than distant signals and that the Panel should consider only a single demographic subset of their viewing data – strains credulity, and simply does not work.

6. Program Suppliers urge, in essence, that the Panel interpret its marketplace value standard as requiring the simulation of a "free market" that is essentially identical to the cable network marketplace.[9] It is necessary for them to do so in order to escape certain key attributes of the distant marketplace, in

---

7 Id.

8 Tr. 7360-7364 (Lindstrom); NAB Demo 21.

9 PS PCL at 149-155.

particular the fact that cable operators may not sell advertising time in distant signals.

7. Program Suppliers first point to the similarities between cable networks and distant signals.[10] They quote from the 1990-1992 CARP's statement that the "simulated market" for distant signals would look very much like the cable network market, "including, most significantly," the fact that distant signals would, like cable networks, be purchased as complete channels, not program–by–program.[11] But Program Suppliers stretch the Panel's specific observation beyond its breaking point, by leaping to the conclusion that distant signal programming decisions, in their hypothetical "free" market, would be almost entirely driven by ratings, particularly 18-49 ratings.[12] This linkage, between the advertising-driven programming interests of cable networks on the one hand and program value on distant signals on the other, simply cannot be made.

8. First, even the old unrelated cases Program Suppliers cite for the general outline of their "simulated market" argument make the point that

---

10 Id. at 150-151.

11 Id. at 150, quoting 1990-1992 CARP Report at 24 (emphasis added).

12 Id. at 164 ("in a simulated free market for distant signals, the Nielsen 18-49 data would be given significant and controlling weight in determining value, just as they are now in the television and cable network markets").

differences between markets being compared must be taken into account in considering analogous-market data.[13] And the absence of advertising on distant signals is an absolutely critical difference, which directly affects cable operators' programming choices.

9. Program Suppliers ignore or attempt to minimize this critical difference.[14] But cable operators and other witnesses confirmed that ratings data plays no role in their program decisions regarding distant signals.[15] Local advertising revenues totaled on the order of $2 billion per year in 1998-1999.[16] Cable operator witness Michael Egan testified that his company sold advertising

---

13 See id. at 149, citing Louisville & N. R. Co. v. United States, 238 U.S. 1, 15-16 (1915), for the proposition that "allowances should be made for the dissimilarities." The cases Program Suppliers cite all arose in connection with determinations of rates under price regulation, which is a different kind of issue than the relative value question before this Panel.

14 See PS PCL at 151 (citing Trautman testimony that local ad revenues constitute about 5% of cable operator revenue). But local ad revenues in 1998-1999 were more than twice the "ancillary" revenues that Program Suppliers witness Dr. Gruen touted as the reason for ignoring viewing by all but 18-49 year old subscribers. See PS Ex. 5-RX, 6-RX (excluding "business cablephone" revenues, Tr. 10511-10513 (Gruen)).

15 See Tr. 514-515 (Trautman) (cable operators sell ads on the most widely carried networks, and ESPN is fairly characterized as "one of the most important" in terms of advertising revenue); Tr. 6028 (Allen) (unaware of any cable operator looking at viewing studies from a distant market in determining whether or not to carry a distant signal); Tr. 1312-1313 (Egan) ("cable operators don't typically look at rating data.").

16 PS Ex. 5-RX.

within about a dozen of the cable networks he carried, of which ESPN was the top revenue generator.[17] Cable industry veteran Judith Allen testified that the inability of cable operators to derive advertising revenues from distant signals was relevant to the overall value of distant signals versus cable networks.[18]

10. Program Suppliers nonetheless appear to propose that WTBS serve as the model for the particular version of a free market simulation they urge the Panel to adopt.[19] They need to do so in order to try to establish a basis for their otherwise unsupportable approach -- not only viewing-driven but 18-49 advertising-driven -- to the royalty allocation.[20]

11. Apart from the irony of suggesting that WTBS should somehow serve as a principal guide to the distribution of the distant signal royalties in the years when it finally was no longer a distant signal, Program Suppliers' proposed standard is unhelpful. By suggesting that the cable network market should be the standard by which to measure the relative value of distant signal programs, the Program Suppliers would have the Panel move away from the direct evidence about

---

17 Tr. 1323 (Egan).

18 Tr. 6145-6146 (Allen).

19 See PS PCL at 154 (WTBS is "an obvious model of how distant signals would operate in a free market").

20 See id. at 153-155.

the distant signal programming market itself. While it would be possible to construct an allocation calculation based on cable network subscriber fees,[21] the direct measure of relative value provided by the Bortz survey is decidedly superior.

12. The best Program Suppliers can do to try to salvage their advertising–based standard is to urge that there is "no reason to think" that cable operators

---

21 For example, it would be possible to calculate relative shares using cable network subscriber fees as surrogates for the "price" measure among program types, and the distant signal program time percentages (NAB 1998-1999 Exhibit 5) as the "quantity" measure. Using subscriber fee numbers for Program Suppliers' preferred referent TBS (Tr. 384 (Trautman)), ESPN (JSC Ex. 100), CNN (NAB 1998-1999 Exhibit 4-X) and A&E (Trautman Written Dir. at 19), the calculation would be as follows:

Program Category	A. Distant Signal Program Time %	B. Cable Net Mo'ly License Fee	A x B	**Relative Shares**
Program Suppliers	60.4%	$ 0.19	$ 0.11	**50.7%**
Joint Sports Claimants	4.9%	$ 0.92	$ 0.05	**19.9%**
Commercial TV	13.0%	$ 0.34	$ 0.04	**19.5%**
Public Television	14.9%	$ 0.15	$ 0.02	**9.9%**
Devotional	2.9%	*	*	**0.0%**

(* No cable network fee information was available in the record for a Devotional programming analogue.) The resulting shares are comparable to other evidence of the relative value of distant signal programming types, but provide only an indirect measure of that value. Any attempt to use such "analogous market" figures is open to debate about the comparability of selected networks and the effects of advertising revenues on the respective license fees.

would not sell advertising on distant signals in a hypothetical "free" market.[22] But the contrary is true instead.

13. It is important to remember that a free market actually operated in 1998-1999. Cable operators were free to fill their growing numbers of channels with programming of their choice. There were far more cable networks available than there were channels to accommodate them.[23] Yet cable operators did not choose to fill all their channels with cable networks. They continued to carry some 850 different television stations as distant signals.[24]

14. Thus, the Program Suppliers' assertion that a hypothetical free market would essentially be identical to the cable network marketplace[25] is starkly at odds with what the cable industry has freely chosen in the current marketplace. Whereas superstations represented some 55% of the instances of distant carriage in

---

22 PS PCL at 150, 152.

23 Tr. 1109 (Hazlett); Tr. 1495 (Travis); Tr. 6104-6106 (Allen); Tr. 1299-1301 (Egan).

24 <u>See</u> PS Exhibit 35-X at PTV 002018 (850 unique stations carried as distant signals by Form 3 systems in 1999-2). Program Suppliers counsel represented that this exhibit had been admitted only for impeachment purposes, Tr. 10506, but it was in fact admitted for all purposes, Tr. 3741.

25 PS PCL at 152-153.

1992, they represented only 39% in 1998.[26] The remaining majority of distant signal carriage consisted of many hundreds of regional stations, generally carried within 150 miles of their home broadcast markets.[27] Thus, the model for the distant signal marketplace is neither WTBS nor national cable networks. Contrary to Program Suppliers' suggestion, distant signals in such a market would not "purchase programs that have broad appeal to large numbers of viewers throughout the country."[28] Nor would they "concentrate[ ] more heavily on popular series and movies."[29] Hence, the relative value of programming in such a market would not depend, as it does in the cable network market, upon national-market advertising sales.

15. Why do cable operators continue to carry distant signals instead of adding more cable networks? What distinguishes distant signals from cable networks is not their syndicated programs and movies, which are available in increasing volume from multiple sources, including cable networks.[30] Instead,

---

26 Testimony of Dr. Thomas Hazlett at Appendix D (total instances of carriage for WTBS, WWOR, WGN, and Other Superstations, divided by total instances of carriage for "ALL," for 1992 and 1998).

27 See NAB 1998-1999 Exhibits 7, 11.

28 PS PCL at 154.

29 Id.

30 Rebuttal Testimony of Arthur C. Gruen at 20-21; see ¶ 39, infra.

distant signal stations are different because of their station-produced news and public affairs programs, and their local sports programs -- the programs that are not available from any other source and create the station's unique identity.

16. Cable operators made real choices to carry distant signals, paying a total of over $215 million in copyright royalties for them in 1998-1999. They made these market-driven choices as businesspeople seeking to maximize profits by attracting and retaining subscribers.[31] They did not do so on the basis of maximizing viewing audiences and advertising revenues, as they may have done with respect to their cable networks, because they are precluded from selling advertising on distant stations.

17. As NAB witness Dr. Joskow explained, a distant signal is a specialized form of cable channel, specifically because it is a retransmitted station that was first transmitted in the broadcast market.[32] In attempting to simulate a distant signal market absent a compulsory license, this key characteristic must be

---

31 Cable operators testified in this proceeding about wanting to avoid taking a channel off that would draw complaints from vociferous subscribers. Tr. 1302-1305 (Egan); Tr. 1507-1511 (Travis). In those cases, the cable operator is presumably making the choice based on retaining even a relatively small number of subscribers who pay monthly subscription fees, or avoiding trouble with franchising authorities that might increase costs or business risk, all of which would be economically motivated.

32 Rebuttal Report of Dr. Andrew S. Joskow at 2.

accommodated, not ignored.[33] In particular, it should not be assumed that advertising sales, which play no role in the distant signal market today, would suddenly become the economic driver of program valuation.

2. The Viewing Studies

18. Program Suppliers persist in arguing that the 18-49 demographic should be afforded more weight than the household viewing numbers provided by their Nielsen viewing study.[34] But they overlook a critical fact -- their own study proves their argument is false.

19. Program Suppliers argue through a series of inferences and assumptions cobbled together by Dr. Gruen that cable network license fees are somehow related to 18-49 viewership (never directly demonstrated), and cable operators must therefore value the 18-49 demographic more highly than other demographics when it comes to distant signal programming.[35] But the Nielsen viewing study itself shows that cable operators actually chose distant signals -- including the most widely carried distant signals[36] -- to which the majority of the

---

33 Id. at 3-4.

34 PS PCL at 161-163.

35 Id. at 161-162.

36 These are the "certainty" portion of the station sample selected for the viewing study. Testimony of Paul Lindstrom at 4-5.

viewing was by demographic groups <u>other</u> than 18-49.[37] A full 56% of the distant signal viewing measured in the Nielsen study was by the 2-17 and 49+ demographic groups.[38] This was the case even though 68% of cable households were headed by individuals between the ages of 18-50.[39] Thus, the Nielsen viewing study proves that cable operators chose to carry distant signals in 1998 and 1999 that skewed heavily <u>away</u> from 18-49 year-old viewers. Even if there were actual evidence that cable operators paid higher license fees to cable networks that attracted a higher percentage of 18-49 viewers, perhaps reflecting advertising opportunities, the Nielsen study provides clear and undeniable evidence that cable operators do not follow the same demographic criterion in selecting distant signals.

20. Program Suppliers argue, bizarrely, that because two witnesses asserted that there is some correlation between 18-49 viewing and household viewing, the elimination of all other demographic groups does not really "ignore" them, it merely gives them less "weight."[40] But Program Suppliers' only purpose in stripping the other demographic groups is to produce higher viewing numbers for itself. If there were actually no difference, Program Suppliers should not object to

---

37 PS Ex. 20, 22; NAB Demo 25.

38 <u>Id.</u>; Tr. 7798-7799 (Gruen).

39 Testimony of Arthur C. Gruen, Ph.D. at 20.

40 PS PCL at 163 n.4.

using Household viewing numbers instead of 18-49. But of course there is a material difference,[41] and the Panel should reject Program Suppliers' groundless argument to distort the results of its study by ignoring 56% of the actual distant signal viewing activity.

21. Program Suppliers assert that the Nielsen study provides a "comprehensive, objective picture of what distant subscribers actually watched."[42] One aspect of the picture, however, is just how little viewing of distant signals is actually done. The viewing reports show that a total of about 8.4 million minutes of distant signal viewing were recorded in all the meter sample households for all of 1998.[43] Mr. Lindstrom's testimony was that the People Meter recorded 252,000 minutes every hour across the 4,200 in-tab households.[44] Multiplying this number by 24 hours in a day and 365 days in the year produces a total number of potential viewing minutes across the in-tab households of over 2.2 billion minutes in 1998. The 8.4 million minutes of viewing to distant signal programming represent only 0.38% of the potential viewing minutes. In other words, the viewing of just the distant signal programs represents, on average, only about 14 seconds per hour, or

---

41 See id. at 167.

42 Id.

43 Id.

44 Testimony of Paul Lindstrom at 13; PS PF at ¶ 234.

about 5 minutes a day, across the sample households. The miniscule size of this viewing is further evidence that distant signal programming decisions are not driven by a viewing measure.

3. The "Avidity" Adjustment

22. Program Suppliers argue that a viewing "avidity" criterion has been given weight by the CARP.[45] But the CARP decision they cite was referring to the kinds of subjective, "perceived value" factors that NAB had presented in the proceeding.[46] Program Suppliers instead propose a so-called "avidity" adjustment that is purportedly "based on the relationship between availability of programming and the viewing to that programming."[47] While such a relationship might be expressed in the form of a rating (the percentage of households who <u>could</u> watch a program who actually do watch), the Nielsen percentages are not ratings,[48] and the comparison of viewing and availability is not easily done using the Nielsen study data.

---

45 PS PCL at 158, <u>citing</u> 1990-1992 CARP Report at 112.

46 1990-1992 CARP Report at 112. <u>See</u> Tr. 1390-1391 (Egan) (discussing subscriber studies used to make programming decisions).

47 PS PCL at 169.

48 Tr. 7011-7012 (Carey); Tr. 7220-7221, 7409-7410 (Lindstrom).

23. Dr. Gruen's initial adjustment made a number of errors, including the comparison of viewing to unweighted time (which ignored the actual availability or potential audience dimension),[49] and the comparison of minutes of viewing to quarter hours of program time.[50] Dr. Ducey presented an alternative set of adjustment calculations that corrected for these errors, and demonstrated that, particularly in light of the very small amount of viewing to these programs, a properly implemented Gruen adjustment would have resulted in virtually no change from the original viewing shares.[51]

24. Program Suppliers attempt again in their Proposed Conclusions of Law to correct the Gruen adjustment. Purporting to use properly weighted minutes of program time, they substitute program minutes data from the Rosston regression analysis report in place of the Nielsen unweighted quarter hours.[52] But this merely introduces a new apples-to-oranges comparison problem. The minutes numbers from the regression study report are for all distant signals (approximately 800

---

49 This is the problem that led the CRT to reject a similar viewing/time ratio argument by Program Suppliers in the 1989 proceeding. 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15289 (Apr. 27, 1992).

50 This ratio is not equivalent to the average audience per quarter hour measure that is frequently used in the broadcast industry. Tr. 7854-7856 (Gruen).

51 Rebuttal Statement of Dr. Richard V. Ducey at 9-10; NAB 1998-1999 Exhibit 17-R.

52 PS PCL at 170-172.

stations) but only for 42 days, and are effectively "weighted" by number of distant signal system carriage instances, whereas the viewing minutes numbers are for 180 stations and for 365 days, and are effectively weighted by individuals (because Program Suppliers use the 18-49 demographic, which may include multiple persons in the same household) rather than systems or even subscribers (i.e., households). Since the purpose of the calculation is to attempt to arrive at a ratio of minutes of viewing per minute of possible viewing, comparing these two very different raw numbers would be nonsensical.

25. These comparability problems may be overcome, however, by using comparable percentages rather than raw numbers. One could substitute for the program time minutes the subscriber-weighted program time percentages reported by Dr. Fratrik, and substitute for the viewing minutes the percentage viewing shares using Household (i.e., subscriber) data. This would finally provide an apples-to-apples comparison of the viewing/time ratio, since it would compare subscribers to subscribers and minutes to minutes, and would avoid the problem of the studies' having used different numbers of stations and days by using percentage shares rather than raw totals. Using this approach, the "avidity" adjustments would be as follows:

Recalculation of "Full Avidity Adjustment" Shares Using Comparable Viewing/Time Numbers

Program Category	A. 1998 Viewing Share (HH) PS Ex. 20	B. 1999 Viewing Share (HH) PS Ex. 22	**C. Average HH Viewing Shares (1998-1999) (A+B)/2**	D. HH-Weighted Time Percentages (Fratrik Study) (1998-1999)	E. "Avidity" Ratio of Viewing to Time C/D	F. Total HH Viewing Minutes (1998-1999) PS Ex. 20, 22	G. Adjusted Total HH Viewing Minutes (1998-1999) E x F	**H. Ratio-Adjusted Viewing Shares**
Program Suppliers	58.90%	61.00%	**59.95%**	60.38%	0.99	10,298,949	10,225,604	**55.1%**
Joint Sports Claimants	9.00%	7.90%	**8.45%**	4.91%	1.72	1,450,113	2,495,612	**13.4%**
Commercial TV	14.40%	15.00%	**14.70%**	13.00%	1.13	2,523,153	2,853,104	**15.4%**
Public Television	16.90%	15.10%	**16.00%**	14.87%	1.08	2,742,542	2,950,953	**15.9%**
Devotional	0.70%	0.90%	**0.80%**	2.94%	0.27	136,706	37,199	**0.2%**

26. The correctly calculated "avidity" ratios for all parties except Program Suppliers and Devotionals are greater than 1.0, and the ratio for Sports is highest, as expected. When the shares are recalculated with this "avidity" adjustment, the share of Commercial Television goes up, and the share of Program Suppliers goes down.

27. The adjustments cannot be done separately for the 3.75 royalty fund, even using the attempted corrected approach, because what Program Suppliers refer to as "3.75" viewing numbers[53] are no such thing at all. They simply collect all

---

[53] Id. at 168, 173-174.

distant viewing everywhere to all stations that were carried as a 3.75 signal anywhere.[54] Thus, a widely carried signal that was carried as a distant signal only once could be heavily represented, but might include no viewing at all by any subscriber to any system that actually paid 3.75 royalties for it.

4. The Regression Analysis

28. Program Suppliers' findings with regard to the Rosston regression analysis exhibit a profound misunderstanding of the study itself. There are two different potential objectives for a regression analysis.[55] The first, which Program Suppliers apparently mistakenly believe was the purpose of the Rosston study, is to analyze the effects of a wide variety of potentially influential variables with the goal of determining which of them is the "key" variable, or most significant predictor of the dependent variable. The second is to seek to measure the effects of particular selected independent variables on the dependent variable, while encompassing as many as possible of the other relevant variables to assure that the measure of the selected variables is accurate.

29. Dr. Rosston pursued the second objective, because that is the only approach that would provide useful information in this proceeding. He measured

---

54 Tr. 9486-9487 (Kessler).

55 <u>See</u> Tr. 9371-9374 (Frankel); NAB 1998-1999 Exhibit 44-RX at 725.

the relative effect of the various program categories at issue in this proceeding on copyright royalty payments paid by cable operators in 1998 and 1999, based on the amounts of programming in each category they actually bought. One could of course make a closer ballpark prediction of differences in royalty payments across systems by looking at the number of subscribers on the two systems. (Indeed, Dr. Rosston's study results provide exactly that information, since he included subscribers among the variables he analyzed, based on his knowledge that subscribers are significantly related to royalty payments.) But that information is simply not helpful to the only question before the Panel, which is the relative market value of the particular distant signal program categories.

30. Thus, Program Suppliers' criticism that Dr. Rosston supposedly "claimed" that the program category variables were "key" while other variables were not[56] is simply nonsensical. But that nonsensical premise is the basis for most of Program Suppliers' attacks on the regression study.

31. Program Suppliers argue that the regression is irrelevant because it studied the relationship between distant signal programs and distant signal royalties, which it claims are irrelevant as a "non-market factor."[57] But Dr.

56 PS PCL at 197.

57 Id. at 191.

Rosston's analysis does not attempt to predict absolute marketplace value of programs in a free market. Instead, it measures relative value, and uses the actual dollars paid for distant signals as the economic base for measuring that relative value.[58] The fact that the royalty rates are below market levels thus does not affect the analysis. In addition, because Dr. Rosston uses the total royalties paid by the system rather than the arbitrarily assigned "fee-gen" royalties by station,[59] he avoids the non-market-based distortions of the statutory DSE schedule.

32. Much of the remainder of Program Suppliers' criticisms are related to their view that the "stated purpose" of the regression was "to predict variations in royalties."[60] This bald misreading of Dr. Rosston's report and testimony infects Program Suppliers' analysis and sends them speeding down the wrong road. They assert that Dr. Rosston had no basis for focusing on the programming variables,[61] but measuring the effect of those variables was the actual purpose of his study.

---

58 Program Suppliers are apparently confused about the difference between "total" value versus "marginal" value, on the one hand, and between "total" value (or absolute value) and "relative" value on the other. <u>See</u> PS PCL at 206 n.16. Dr. Rosston's analysis ultimately provided a measure of relative total value, since it took the relative marginal value coefficients for each category and multiplied them by the number of minutes of each category actually purchased in the distant signal marketplace.

59 Report of Gregory L. Rosston at 12, App. B.

60 PS PCL at 192.

61 <u>Id.</u> at 193-194.

They complain that programming variables explain very little of the overall variance in royalties,[62] but that reality of the cable industry does not affect the accuracy of Dr. Rosston's measure of the relative value of the different program categories, no matter how small their combined effect was. They assert that Dr. Frankel's mindless manipulations of various datasets, including some that Dr. Rosston did not even use, shows that the regression results are "volatile,"[63] but removing inter-related variables from a regression analysis would absolutely be expected to change the measured coefficients,[64] and Dr. Rosston's approach of including all potentially influential variables was the best way to assure the accuracy of the measurement of the program category coefficients themselves.

33. Program Suppliers next assert that the Fratrik program time study was flawed, and that the regression analysis is flawed because of its use of data from Dr. Fratrik.[65] But those conclusions are again based on flat misreadings of the testimony. First, the regression analysis did not use subscriber-weighted program

---

62 Id. at 194-196.

63 Id. at 196-198.

64 Dr. Frankel claimed the opposite in his written rebuttal testimony, but ultimately admitted that when "independent" variables are actually inter-related, removal of some would change the coefficients of those remaining, and that his analyses showed that all of the cable system variables were inter-related in some degree. Tr. 9431-9434 (Frankel).

65 PS PCL at 199-202.

minutes data, but instead used raw minutes data for each station carried as a distant signal.[66] However invalid Program Suppliers' criticisms of Dr. Fratrik's subscriber-weighting approach in the program time study may be, they have nothing to do with the regression analysis. Second, the Program Suppliers' assertion that the program time study was not based on a probability sample apparently derives from Dr. Frankel's failure to read or understand Dr. Fratrik's testimony about his stratified random sample approach, which is a well accepted method for selecting a representative probability sample in media content research.[67] This criticism thus also fails.

34. Finally, Program Suppliers assert that Dr. Rosston's reported shares for the program categories, which multiply the "implied price" coefficient by the total volume of minutes purchased, fail properly to measure "total value."[68] As became clear during cross-examination of Dr. Gruen, however, Program Suppliers believe the proper measure for the Panel to follow is the relative amounts of "consumer surplus" subscribers receive from distant signal programs.[69] Dr. Gruen agreed that what the Rosston shares measured was more akin to a market price

---

66 Report of Gregory L. Rosston at App. B; JSC Ex. 6-X at 9-10.

67 Tr. 9363-9366, 9371 (Frankel); NAB 1998-1999 Exhibit 42-RX.

68 PS PCL at 205-208.

69 Tr. 10454-10455, 10461-10462 (Gruen).

multiplied by the volume of units sold at that price, or essentially the revenues that a seller would take away from the marketplace.[70]

35. NAB's view, apparently contrary to Program Suppliers', is that Dr. Rosston's "price times quantity" measure is more relevant to the Panel's task than Dr. Gruen's concept of "total value."

5. Program Suppliers' Proposed Reduction in the Commercial Television Share Has No Basis in the Record.

36. Program Suppliers' proposal that Commercial Television claimants be awarded 6.8% of the 1998 and 1999 royalties[71] is merely plucked out of thin air, with no quantitative basis and no plausible justification.

37. As best we can tell, Program Suppliers assert only that news programs have "lesser value" than the quantitative studies actually show, and that the value of that programming decreased in the distant signal market between 1990-1992 and 1998-1999 because of increased competition from regional cable news networks.[72] The only reference to a quantitative basis for the proposed share is that Program

---

70 Tr. 10447-10448 (Gruen); NAB Demo 33.

71 PS PCL at 211.

72 Id. at 209-211.

Suppliers appear to start with an avidity–adjusted viewing share and then make a "further downward adjustment" of an unspecified amount.[73]

38. Program Suppliers' first argument about the supposed "lesser value" of news programs is that they are supposedly "recycled, repeated, and shared."[74] But there is no evidence in the record that entire newscasts are simply taped and repeated throughout the day. Indeed, it would defy common sense for that to be the case, since each newscast is a live program, whose value is in providing up–to–the–minute reports on events of the day, in addition to features, consumer reports, sports coverage, and so on.[75] The fact that some stations have begun to provide more newscasts throughout the day reflects the value people derive from having an immediate live report when they are able to watch.[76] The fact that successive newscasts may cover the same important stories in no way diminishes the value of each live newscast.

39. It is exceedingly odd that Program Suppliers would even suggest such a theory about live newscasts, given that Program Suppliers programs are almost

---

73 Id. at 209.

74 Id.

75 Tr. 2238-2239, 2253-2254 (Alexander); Statement of Marcellus Alexander, Jr. at 3-5.

76 Tr. 2315-2316 (Alexander); Statement of Marcellus Alexander, Jr. at 4.

by definition reruns of programs that have already aired and are available from multiple sources.[77] Except for "first run" game shows, talk shows, and the like, the vast bulk of syndicated programs are simply recycled and aired in identical form over and over again.[78] Program Suppliers, indeed, have gone so far as to declare that this constant repetition is a positive feature of their programming.[79]

40. Program Suppliers' second argument is that increased competition from regional cable news networks has somehow diminished the value of distant signal news programs.[80] They cite in particular Mr. Alexander's guesstimate that the overall ratings for broadcast stations' local news programs in two local markets with which he was familiar might have declined by 5% to 10% over a period of years.[81] While logically that local-market effect might well have resulted from other kinds of competition (such as diversion to other types of programming, or to distant signal news programs, or even to other non-viewing activities) as opposed to

---

77 Tr. 1496-1497 (Travis) ("there's huge duplication from channel to channel of sitcoms"); Tr. 8132-8138 (Thompson); Tr. 6127 (Allen); Tr. 6745-6746 (Green) (movies less important in broadcast syndication as cable networks acquired more).

78 Tr. 829 (Crandall) ("there is nothing unique to yet another rerun of MASH"); Tr. 8138 (Thompson); Tr. 6309-6310 (Winkleman).

79 PS PCL at 188-189.

80 PS PCL at 210-211.

81 Id. at 211.

regional cable news networks in particular, it is irrelevant in light of the direct evidence in the record. Program Suppliers' own Nielsen viewing study shows that between 1992 and 1998, the percentage of viewing to Commercial Television programming on distant signals doubled. The actual record evidence cannot be read in any way to support Program Suppliers' bald assertion that the value of Commercial Television station news programming on distant signals "greatly diminished,"[82] or indeed even diminished at all. In fact, all of the record evidence shows that the relative market value of station news programming greatly increased between 1990-1992 and 1998-1999.

41. The Commercial Television royalty share should be calculated on the basis of the Bortz survey results, as adjusted. But even taking Program Suppliers' own proposal that it should be based on viewing data, the proper award for Commercial Television would exceed 14.5%. Starting with the Household viewing shares themselves, and following the same approach as the 1990-1992 CARP,[83] Commercial Television would be awarded 14.7%, its average viewing share for the two years. But even if the Panel were to make an "avidity" adjustment, as Program

---

82 See id.

83 See 1990-1992 CARP Report at 112-113 (awarding a royalty share equal to the average Nielsen Study viewing share).

Suppliers suggest,[84] a proper calculation of such an adjustment, as demonstrated above, would result in an increase rather than a decrease in Commercial Television's viewing share, to approximately **15.4%**.

42. The record evidence, notwithstanding Program Suppliers' efforts to distort or ignore it, compel a substantial increase in the Commercial Television royalty share.

---

[84] PS PCL at 211-212.

B. THE JOINT SPORTS CLAIMANTS

43. The Joint Sports Claimants face a similar dilemma, apparently because of their settlement agreement with the Program Suppliers,[85] in attempting to force the square peg of Program Suppliers programming into the round hole left behind in their Bortz-based shares. They propose to use the Bortz shares as a starting point for the shares of all claimant groups,[86] but then propose allocations that would result in a royalty share for Program Suppliers at nearly the same level they were awarded in the 1990-1992 proceeding.[87] Accepting these proposed shares would result in more than a 13-point increase for Program Suppliers over their 1998-1999 Bortz share.[88] Such a huge premium above the Bortz Study results for Program Suppliers – while all other shares are set at or below their Bortz numbers – would not only be unsupported by the evidence in the record, it would be flatly contradicted by that evidence.

---

85 See JSC PF at 4 & n.1.

86 Id. at 15.

87 See id. at 4 (sum of proposed shares for other parties equal 47.6% on average, prior to music deduction)

88 Program Suppliers received a Bortz share of 38.8% for 1998-1999. NAB PF at ¶ 63. JSC, by not allocating a Bortz share to Program Suppliers, leaves 52.4% of the royalty pool unallocated prior to a music award deduction. JSC PF at 3-4, n.1.

44. In order to find the extra royalties necessary to pay this premium to its settlement partner, however, JSC proposes substantial downward adjustments for the Commercial Television and Public Television shares.[89] In the case of Commercial Television, these downward adjustments are unsupported by either evidence or logic.

45. JSC urge that the Panel "depart from the Bortz results for a particular claimant only where there is a substantial record basis demonstrating that an adjustment is necessary to reflect accurately the relative market value of that claimant's programming."[90] The departure they propose for the Commercial Television share is based solely on an unwarranted inference they seek to draw from a comment filed by NAB in an FCC rulemaking proceeding.[91] As explained further below, that document provides no evidentiary basis at all, much less a "substantial record basis," for any "seller's side" reduction in the Commercial Television Bortz share. By contrast, there is direct record evidence, under the same discredited theory, that would require a substantial downward adjustment in the shares of Program Suppliers and the Joint Sports Claimants themselves. JSC's proposals are unjustified and internally inconsistent.

---

89 JSC PF at 35, 38.

90 Id. at 15.

91 Id. at 37-38.

1. The Proposed "Seller's Side" Adjustment.

46. JSC argue persuasively that the "seller's side" criticism of the Bortz survey is not well founded and provides no basis for discounting the Bortz surveys.[92]

47. The criticism was first raised by Program Suppliers in the 1983 proceeding.[93] It was first opposed by JSC witnesses.[94] In the 1983 Proceeding, JSC asserted that MPAA's supply side criticism, if accepted, should affect local programming more than sports programming, because broadcasters are more interested in expanding the coverage of their programming than are sports interests.[95] The CRT properly declined to follow this argument, holding that the seller's side "probably affects sports more than most claimant groups," and concluding that the Bortz-survey results should accordingly be discounted.[96] In the

---

92 Id. at 10.

93 See id. at ¶66; 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12795 (Apr. 15, 1986).

94 See 1989 Direct Testimony of JSC witness Dr. Robert Crandall, JSC June 16, 2003 Incorporated Testimony, Vol. 2 of 5 at Tab 8, p.7.

95 JSC 1983 PF at ¶ 79.

96 1983 Cable Royalty Distribution Proceeding, 51 Fed. Reg. 12792, 12811 (Apr. 15, 1986).

1990-1992 CARP Decision, the criticism was cited as a basis for reducing only the Devotional share,[97] not the Commercial Television share.

48. In this proceeding, by contrast, the seller's side criticism was not raised by Program Suppliers, who presented no witnesses opposing the Bortz study, presumably due to their settlement agreement. Nor has it been raised by any of the other parties. JSC themselves presented Dr. Crandall as an expert witness in their direct case, opposing the argument as part of his criticism of the 1990-1992 Panel Decision regarding the Sports share.[98] No party at all has suggested that the "seller's side" criticism be repeated by this Panel. It would be strange indeed for the Panel to undertake a new and radical set of "seller's side" adjustments in this case on the basis of a record in which all parties have opposed such adjustments..

49. JSC slyly insinuate in their comments that NAB presented a rebuttal witness explaining the invalidity of the "seller's side" criticism because it is "naturally most concerned" about the issue.[99] In fact, NAB presented a rebuttal witness only in response to the attack leveled against NAB's share by JSC in its own direct case evidence.

---

97 1990-1992 CARP Report at 98, 130.

98 Direct Testimony of Dr. Robert W. Crandall at 6, 10.

99 JSC PF at 10 and ¶69.

50. JSC also falsely and misleadingly claim that "NAB has traditionally been the lead opponent" of the seller's side criticism of the Bortz survey, citing NAB's presentation of a witness in the 1990-1992 proceeding.[100] The circumstances under which NAB presented witnesses in support of JSC's Bortz Survey in the prior proceeding cannot properly be interpreted without a complete understanding of the terms of certain agreements among claimant groups, some of which were confidential. NAB would be willing to disclose and discuss such terms if the other parties to the agreements consented, but unless a more complete airing of the circumstances is made, the Panel should decline to draw the inferences JSC appear to suggest about NAB's supposed "lead" role.

a. As JSC Have Already Demonstrated, There Is No Justification for Adjusting the Bortz Results to Reflect Imagined "Seller's Side" Effects

51. In the 1989 proceeding, JSC witness Dr. Robert Crandall testified that Program Suppliers, the originators of the "seller's side" criticism of the Bortz surveys, had presented no evidence that supply side considerations affected the relative values of the various programming categories.[101] He explained that "[i]f each 'Phase I' program supplier group were allowed to bargain collectively with

---

100 Id. at ¶68.

101 1989 Direct Testimony of JSC witness Dr. Robert Crandall, JSC June 16, 2003 Incorporated Testimony, Vol. 2 of 5 at Tab 8, p. 7.

cable operators, the marginal values of the different program types would equal their total values (as measured in the Bortz study.)"[102]

52. Again in this proceeding, Dr. Crandall adamantly argued against adjusting the Bortz results due to supply side concerns.[103] He testified that any supply side adjustment is without economic merit,[104] and that he does not endorse making any alterations to the Bortz allocations due to supply side concerns.[105] In his rebuttal testimony, Dr. Crandall explained that "economic theory suggests that sellers of distant signals would not allow consolidation among buyers to result in a decrease in the absolute prices paid for programming," since "seller-side concentration would offset most (if not all) market power on the buying side."[106]

53. Dr. Crandall also testified that "even if copyright holders were able to restrict supply on distant signals, there is no reason to believe that cable system

---

102 Id. at p. 14.

103 NAB PF at ¶¶ 119-121.

104 Testimony of Dr. Robert W. Crandall at 10.

105 Tr. 10244-10245 (Crandall).

106 Rebuttal Testimony of Robert W. Crandall at 2.

operators would spend more or less in absolute terms on any programming category than their Bortz-implied share."[107]

54. JSC similarly urged in their 1990-1992 Proposed Findings that if "only the relative price for each category is at issue," then the Panel "need not worry about the supply side."[108] This followed from testimony by various witnesses that "sellers' side" adjustments to the shares resulting from JSC's Bortz study would be unnecessary and inappropriate given the nature of the distant signal marketplace.[109]

55. Dr. Andrew Joskow also testified on behalf of NAB in the rebuttal phase of this proceeding that it is not necessary, from an economic perspective, to make adjustments to cable operators' relative valuations of distant signal programming to reflect "supply side" considerations.[110] Dr. Joskow explained that absent a compulsory license, the fundamentals of distant signal retransmission would not be different, because the conditions that create a fixed supply of distant signal programming available to cable systems would remain in the hypothetical

---

107 Id.

108 JSC 1990-1992 PF at 96 ¶180.

109 JSC 1990-1992 PF at ¶¶ 180-183; JSC 1990-1992 Reply PF at 17-18.

110 Rebuttal Report of Dr. Andrew S. Joskow at 2.

world.[111] The distant signals being retransmitted by cable operators are defined, by nature, first as local broadcast stations.[112] Broadcasters will continue to make programming decisions based on their broadcast markets,[113] which will continue to distinguish them from cable networks. Any adjusting of the Bortz results, based on unavoidably hypothetical assumptions about subjective bargaining strength or attitudes, would be both "unnecessary and arbitrary."[114]

b. There Is No Evidence to Support JSC's Argument Concerning Broadcasters' Supposed Willingness to Accept Below-Market Royalties

56. Over and above the irreconcilable self-contradiction in their position, JSC's argument on the application of a "seller's side" adjustment to the Commercial Television Claimants' Bortz share simply cannot be sustained.

(1) The So-Called "$4.50 Rate"

57. JSC propose a Basic Fund royalty share of only 5.0% or 5.1% for Commercial Television claimants, based on their "proposed $4.50 rate and their

---

111 Id. at 3.

112 Id. at 2-3.

113 Id. at 3.

114 Id.

Bortz shares."[115] The "$4.50 rate" to which they refer is derived from a comment NAB filed in an FCC rulemaking proceeding in January 1993, a copy of which JSC introduced during redirect examination of one of its own witnesses in this proceeding as JSC Exhibit 2.[116] Although the document bears the name of Dr. Mark Fratrik, who was an NAB Vice President at the time, JSC chose not to examine Dr. Fratrik about the comment when he subsequently appeared in this case, instead waiting until their proposed findings to roll out their theory about what NAB supposedly "meant" when it filed its comment.

58. JSC's daisy chain of unsupported inferences leading from this FCC filing to a proposal for a radically reduced Commercial Television share is superficially clever, but "the box when opened is still empty."[117]

59. The sole foundation for JSC's proposal is the assertion that NAB's 1993 FCC comments somehow provide evidence of the dollar amount that broadcasters would be willing to accept for their programs in hypothetical copyright royalty negotiations with distant cable operators in the absence of a compulsory

---

115 JSC PF at 37-38.

116 Id. at 37 & ¶ 302; Tr. 1255-1257 (Hazlett).

117 See 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9566 (Mar. 7, 1983).

license.[118] The only possible evidence that could be relevant under the "seller's side" argument would be clear evidence that broadcasters across the board would actually accept royalty payments that are less than the relative market value share of their own programming in a hypothetical "free" distant signal market.[119] The comments are evidence of no such thing.

60. First, the comments do not even come close to making the statement JSC would have the Panel read into them, upon which JSC's argument is necessarily grounded. Nowhere to be found in the comments is any statement that broadcasters would be willing to accept any particular dollar amount as copyright royalties for distant signal carriage of their programs. Indeed, they do not even mention copyright royalty distributions at all.[120] As JSC witnesses have admitted, NAB never sought to lower the copyright royalties they received for their programs.[121]

61. In the absence of a direct statement that would support their theory, JSC argue instead that (1) NAB's comments proposed a basic tier rate of $4.50,

---

118 JSC PF at ¶¶ 304-305.

119 The premise of the JSC argument is that the relative market value of the Commercial Television programming is at least the 14.8% share measured by the Bortz Survey.

120 See JSC Ex. 2.

121 Tr. 1240-1241 (Hazlett).

which (2) would translate into a particular dollar amount of copyright royalties, which (3) in turn would translate into a particular dollar amount of royalties for the Commercial Television category under the compulsory license, which (4) would, finally, provide some indirect evidence of the maximum amount broadcasters would be willing to accept for their programs in hypothetical negotiations with cable operators in the absence of a compulsory license.[122] But JSC's strained syllogism fails at every step.

62. First, NAB's comments did not propose a rate of $4.50. Instead, they proposed adoption of a methodology for determining reasonable rates, which was based on a hybrid of benchmark and cost-based regulation.[123] The $4.52 figure mentioned in the comments was not being recommended as a basic tier rate, but was merely an average of the rates calculated for a handful of cable systems for which preliminary data were available.[124] The range of rates resulting from the sample calculations included a rate of $7.35 for one system.[125] And, as NAB

---

122 JSC PF at ¶¶ 302-304.

123 JSC Ex. 2 at pp. 16-18.

124 Id. at pp. i, 19.

125 Id. at p. 19 n.22.

emphasized, the data used for the illustrative calculations were only preliminary.[126] Thus, JSC's references to the "NAB's $4.50 rate proposal" are flatly misleading.

63. Moreover, NAB's proposed approach expressly contemplated that the basic tier rate would be increased, with the addition of more channels to the basic tier.[127] After the basic rate was set on the basis of capital cost benchmarks and variable costs, any additional cost incurred for additional channels could be recaptured, along with an approved rate of return, through increased basic service rates.[128] In this way, NAB said, the rate system would provide an incentive for cable operators to increase the quality of the basic tier by adding valuable channels.[129] Thus, it was NAB's expressed belief that whatever rates might be set for particular cable systems if its proposed approach was adopted in 1993, those rates could and would be increased by the continuing expansion of the basic tier offerings.

---

126 Id. at pp. i, 19 n. 22. Attached to the NAB comment is a report of the consulting group on which the rate approach was based, in which the authors specifically caution that "back of the envelope" calculations were employed to arrive at the illustrative rate ranges. Id. at App. A, p.2.

127 Id. at 20.

128 Id. at 16, 20.

129 Id.

64. The second step in JSC's argument is that NAB's proposed rate would translate into a determinably reduced copyright royalty fund, based on the ratio of the supposed NAB–proposed rate to the then-current average basic tier rate.[130] Of course, NAB's comments never address any issue regarding copyright royalties, so there is no basis for suggesting that it contemplated any effect one way or the other on the royalty fund. And NAB did not actually propose a $4.50 rate, so a critical step in JSC's attempt to argue that NAB was "willing to accept" royalties of a particular amount based on a total royalty fund produced by JSC's $4.50–based ratio calculations is simply wrong.

65. But JSC's supposition regarding the second step of its argument is wrong for another reason as well. The amount of the royalty fund was dependent in part on cable systems' gross receipts from all tiers of service that included any broadcast signals.[131] This would include tiers of service beyond basic that included superstation signals.[132] NAB expressly declined to propose any rate regulation for the expanded basic tiers.[133] But because tiering was increasingly used as a

---

130 JSC PF at ¶¶ 305-306.

131 17 U.S.C. § 111(d); Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, 836 F.2d 599 (D.C. Cir. 1998).

132 Tr. 10186-10187 (Crandall); 47 C.F.R. § 76.901(a).

133 JSC Ex. 2 at 7 n.7.

technique to maximize cable revenues,[134] because upper tiers were subject to less stringent rate regulation,[135] and because superstation carriage could be expected to continue to increase,[136] the total size of the royalty fund would not necessarily have declined simply as a result of regulation of the basic tier rates. Moreover, given that the premise of NAB's rate regulation proposal was that it gave cable operators an incentive to improve the quality of their basic tier program offerings,[137] it would be expected that subscribership, and total royalties, would grow at an increasing rate.[138] At the least, no inference can properly be drawn from NAB's comments about the resulting size of the royalty fund, or about broadcasters' purported knowledge that their proposal would have a determinable effect on the size of the funds.

---

134 Statement of Dr. Richard V. Ducey at 6-7; Tr. 1998 (Ducey).

135 See Tr. 10186-10187 (Crandall).

136 NAB 1998-1999 Exhibit 3. In fact, after a temporary decline, carriage of superstations sharply increased after rate regulation was implemented, while the carriage of all other types of distant signals continued generally to decline. Id.

137 JSC Ex. 2 at pp. 16, 20.

138 As Dr. Hazlett pointed out, the rate regulation system actually adopted by the FCC blunted the predictable subscriber–increasing effects of rate reductions, because the cable operators also reduced the quality of their offerings. Tr. 1062, 1070-1071, 1153-1158 (Hazlett). If a system had been adopted that provided incentives for improving quality, as NAB said its proposal would do, the overall effect would likely have been a reduction in price followed by a surge in new subscribers, with a resulting increase in the royalty fund.

66. JSC's calculation of the royalty fund size they say NAB must have known would result from its rate proposal illustrates this very fact. JSC calculate the amount by comparing apples and oranges. They say that the presumed effect of the adoption of NAB's proposal (again misleadingly characterized as a $4.50 rate) on the royalty fund is based on the ratio between $4.50 and the average monthly gross receipts per subscriber for Form 3 systems in 1998-2, reported by Dr. Hazlett as totaling $13.15.[139] But those average gross receipts include revenues from tiers of service beyond the basic tier, as well as revenues from, for example, converter rentals and additional set fees.[140] JSC's failure to provide evidence about, or even consider, the size and potential growth of additional revenues that were unaffected by NAB's basic tier rate proposal is yet another reason to reject the unsupportable chain of inferences by which JSC seeks to link the NAB comments and broadcasters' supposed willingness to accept a certain amount of royalties for their programs.

67. The third necessary step in JSC's argument concerns the percentage of the royalty fund broadcasters purportedly were willing to accept under the compulsory license when NAB filed its comments in January 1993.[141] JSC assert that the share NAB "expected" to receive at that time was 5.7%, the amount that

---

139 JSC PF at ¶¶ 305-306.

140 NAB Demo 3 at vi.

141 JSC PF at ¶ ¶ 304-306.

had been awarded by the CRT in the 1989 distribution proceeding.[142] JSC then string together a series of nonsensical assumptions to conclude that the share that "NAB would accept as a willing seller of its programming" is 1.9% of the 1998 royalties![143] But shortly after filing its rulemaking comments in 1993, NAB sought a significantly increased share (12.6%) of the royalties in the 1990-1992 proceeding, and it achieved a part of that increase.[144] The royalty distribution cases for the years 1993 through 1997 were settled by all parties, at a time when the FCC's rate regulation decisions and the sizes of the respective years' royalty funds were already known. And NAB is again claiming in this proceeding a share of the royalties equal to its Bortz Study share, as adjusted upward to reflect the "PBS–Only" and "WGN" adjustments.[145] It would be exceedingly strange, and certainly arbitrary, to conclude that broadcasters should receive less than their Bortz share on the basis of an argument that NAB demonstrated its willingness to accept less by having filed rulemaking comments that never addressed that issue at all. NAB's "willingness to accept" a royalty share is directly established by the amount of the claim it is actually making in this proceeding, and has expressly, consistently, and actively claimed in past proceedings.

---

142 Id.

143 Id.

144 1990-1992 CARP Report at 111-113.

145 NAB PF at 162.

68. The final step, of course, is to suppose that the amount of royalties JSC has calculated as being implied by the FCC comments has something to do with the royalty share broadcasters would seek in the absence of a compulsory license. But there is no evidence to support the supposition that broadcasters would accept less than what cable operators have said they are willing to pay. As described below, the various assertions JSC make about imagined offsetting benefits broadcasters would gain from distant carriage are contrary to the record evidence. If anything, they apply with greatest force to the programming of the Program Suppliers and Joint Sports Claimants themselves, as discussed below.

69. In any case, JSC Exhibit 2 would be an improper evidentiary basis for the conclusions JSC asks the Panel to draw. The document was admitted for the limited purpose of demonstrating that the statements made in the comments were filed at the FCC.[146] But NAB did not make a single statement in the document regarding its willingness to accept any particular level of copyright royalties, which is the finding JSC urges the Panel to make. As counsel for the Joint Sports Claimants himself argued when the shoe was on the other foot, it would be

146 Tr. 1258 (Hazlett).

inappropriate to infer what a party "meant" based solely on what it "said" in rulemaking comments.[147]

70. JSC counsel chose not to cross-examine Marcellus Alexander, the only broadcaster witness in this proceeding, about whether in fact he would accept less than the full Commercial Television Bortz share if he had to negotiate directly in the marketplace with distant cable operators. On redirect, however, Mr. Alexander unequivocally stated that he would not do so.[148] That is the sum and substance of the direct evidence in the record on the "seller's side" issue regarding Commercial Television programming, and it does not support a reduction in the Bortz Study share. Broadcast stations, as profit-maximizing commercial business entities, will seek to maximize the copyright royalties they receive for their programs in distant markets.[149]

---

147 Tr. 10273-10274 (Garrett objection during redirect examination of Dr. Crandall regarding NAB Exhibit 56-RX, which was a copy of NBA/NHL comments to the FCC opposing an interpretation of the statute that would have had the effect of increasing the royalty fund: "the document's going to speak for itself. The Witness was not familiar with it. Mr. Stewart has asked his questions about it, I've asked my questions about it, and I would just simply say we could argue what it means, but I think I know what the sports leagues were saying.").

148 Tr. 2398-2399 (Alexander).

149 See Tr. 1222 (Hazlett) ("Weak negotiators may be a bit of a confusing term in that sense because, you know, the broadcasters obviously will be fierce in pursuing their objectives.").

(2) Alleged Broadcaster Interest in Carriage in Distant Markets

71. While broadcasters do have a strong interest in carriage throughout their local markets, they have no commercial interest in being carried in distant markets.[150] JSC's claim that NAB receives increased advertising revenues from reaching distant subscribers[151] is both false and flatly contrary to the record in this proceeding.

72. Marcellus Alexander, Executive Vice President of NAB's Television Department and former station manager and general manager for KYW in Philadelphia and general manager for WJZ in Baltimore, testified that advertisers will not pay stations for any possible viewers in outlying areas beyond their local markets.[152] Mr. Alexander explained that national advertisers are buying time for viewership within an ADI, and will not pay for any extra audience outside the ADI, since they will be buying time in those ADIs separately.[153] Agreeing with Judge Young's characterization, Mr. Alexander testified that stations are essentially "indifferent" from a business perspective to whether they are carried as distant

---

150 Tr. 2294-2298 (Alexander); Tr. 6954 (Carey); Rebuttal Report of Dr. Andrew S. Joskow at 6-7.

151 JSC PF ¶ 300.

152 Tr. 2294 (Alexander).

153 Id.

signals.[154] Mr. Alexander noted that as copyright owners, stations want to be compensated for their programs through royalties.[155] But when, for example, WJZ was carried as a distant signal, the benefit was generally to the cable subscribers and not to WJZ.[156]

73. JSC flatly mischaracterize Mr. Alexander's testimony, asserting that its "clear implication" is that stations are able to use distant carriage "as a negotiating tool that ***allows them to get a higher price from an advertiser*** than they otherwise would have gotten."[157] In truth, however, Mr. Alexander testified to the opposite effect in response to JSC counsel's cross-examination:[158]

> Q When your advertising salesmen go out and try to convince potential advertisers to sign up, is that how they describe it, that this is a value added to you?
> A When it is used, and there are a number of agencies and advertisers who are very specific. They say our target area is the ADI. They are not interested, and depending on their level of disinterest, smart sales people don't try to push something on them that they don't want.
> And certainly – I should say certainly

---

154 Tr. 2295 (Alexander).

155 Tr. 2296-2297 (Alexander).

156 Tr. 2297-2298 (Alexander).

157 JSC PF at ¶ 300 (emphasis added).

158 Tr. 2377-2378 (Alexander) (emphasis added).

> won't pay for. When there is a buyer who might be persuaded that this has some value, it would either be as bonus weight, bonus audience, or as I described earlier, value added. They are one and the same.
>
> ***But it is an audience that the advertiser would get without incurring any incremental cost to get it.***
>
> Q Would it be fair to say that at least in some instances that this bonus coverage might convince an advertiser to purchase spot time that it might not otherwise purchase?
>
> A It would be an exception rather than the rule that that persuaded someone.

Thus, the clear import of Mr. Alexander's testimony, flatly contrary to JSC's proposed finding, is that broadcasters do not obtain higher prices from advertisers due to distant signal carriage.

74. Mr. Alexander's testimony was confirmed by the testimony of Program Suppliers' witness Carl Carey, who was General Manager for WNBC–TV in 1982-1989 and General Manager for WCBS from 1992-1998.[159] Mr. Carey testified he had no idea how many cable systems carried WCBS as a distant signal because it was "irrelevant" to him because it had nothing to do with his job of maximizing the profitability of the station.[160] He explained that "the fact that we were carried [as] distant signals was not something that I could turn around and sell to

---

159 Testimony of Carl V. Carey at 1.

160 Tr. 6954 (Carey).

advertisers."[161] Mr. Carey further testified that he did not receive any ratings data for areas in which his television stations were carried distantly.[162]

(3) Other Legislative and Regulatory Positions

75. JSC assert that a number of positions taken by NAB regarding legislative and regulatory changes in the early 1990s somehow should affect their royalty share.[163] JSC rely solely on the so-called "$4.50" rate analysis to propose an actual quantitative adjustment to the Commercial Television share, and that analysis fails, as discussed above. But none of the other legislative or regulatory change issues provides any basis for a reduction in the Commercial Television Bortz share either.

(a) Dr. Hazlett's Analyses

76. JSC claim that NAB supported cable rate regulation, must carry rules, retransmission consent rules, and the 1994 legislative redefinition of distant signals, and should consequently be somehow penalized by receiving lower cable copyright royalties.[164] Dr. Hazlett presented a theoretical basis for allocating

---

161 Id.

162 Tr. 6957 (Carey).

163 JSC PF at ¶¶ 302-313.

164 Id.

portions of the overall difference in the total amount of the cable royalty funds between 1991 and 1998-1999 to certain legislative changes.[165] He asserted that the legislative changes were sought by commercial and public broadcasters in favor of supposed offsetting benefits.[166] He also, however, acknowledged the role of the loss of superstations WTBS and WWOR in the overall royalty decline.[167] He did not propose any particular adjustment in the Commercial Television share resulting from his analysis. But his analysis is deeply flawed and unreliable.

77. Dr. Hazlett's analysis relied entirely on his assumption that, all things being equal, the actual percentage increase in Form 3 subscribers from 1992 to 1998-1999 would have caused the cable royalty fund to reach $232.2 million in 1998.[168] All his analyses are based on a comparison of actual royalties to this hypothetical "baseline."[169]. He considered that only two principal factors are

---

165 Testimony of Dr. Thomas Hazlett at 5-9; Dr. Hazlett acknowledged that, if the Panel decided not to consider the seller's mentality in making its determination, his testimony would be irrelevant. Tr. 1239-1240 (Hazlett).

166 Tr. 914-915 (Hazlett). Dr. Crandall makes a similar argument. <u>See</u> Testimony of Dr. Robert W. Crandall at 12.

167 <u>Id.</u>

168 Tr. 870-871 (Hazlett); Testimony of Dr. Thomas Hazlett at 5.

169 Testimony of Dr. Thomas Hazlett at 9-13.

responsible for the so–called "shortfall" (i.e., the difference between actual royalties and his "baseline") – legislative changes and superstation changes.[170]

i) Problems With Dr. Hazlett's Baseline

78. Dr. Hazlett constructed his baseline using an assumption that if nothing else changed except the 24.2% increase in Form 3 cable subscribership from 1992 to 1998, the cable royalty fund would have been $232.2 million dollars in 1998.[171] The baseline was a hypothetical creation constructed entirely by Dr. Hazlett.[172]

79. While Dr. Hazlett speculated that rate regulation and other legislative effects did not themselves have an effect on subscriber growth, he did not present any evidence to support that assumption.[173] Dr. Hazlett did speculate that a reduction in the "quality" of cable service offerings must have occurred in 1993-1994 because no measurable increase in cable purchases occurred in response to the decline in price, as would have been expected.[174] He did not, however, analyze the

---

170 Tr. 871-872 (Hazlett); Testimony of Dr. Thomas Hazlett at 5.

171 Tr. 963-964 (Hazlett).

172 Id.

173 Tr. 1156-1159 (Hazlett).

174 Tr. 1160-1161 (Hazlett).

extent to which price effects of rate regulation may have prevented further declines in subscriber growth.[175]

80. As noted in the NAB proposed findings, when comparing the actual royalty fund amounts to his hypothetical baseline amount, Dr. Hazlett failed to account for a number of factors that could also have affected the royalty funds.[176] Dr. Hazlett did admit that having multichannel satellite video services as a competitive alternative may have affected cable penetration, and that macroeconomic effects, such as the 1990-1992 recession and changes in the amount of household disposable income could have slowed the growth of cable subscribership as well.[177] Dr. Hazlett conceded that competition would also tend to reduce rates, but he did not incorporate any factor in calculating his baseline to account for the possible increase of competition during this period.[178]

81. Furthermore, Dr. Hazlett was only provided data for 1992-2, 1993-2, 1997-2, and 1998-2.[179] His not having had data for all of the intervening years

---

175 Tr. 1150-1152 (Hazlett).

176 See NAB Demo 6; NAB PF at ¶ 126.

177 Tr. 1162-1164 (Hazlett).

178 Tr. 1073-1075 (Hazlett).

179 Tr. 996 (Hazlett).

limited his ability to perform a proper analysis of the various changes that had occurred between 1992 and 1998.[180]

82. There was an explosion of new cable networks from the 1990-1992 period to the 1998-1999 period.[181] Other JSC witnesses testified that on the order of 200 or so cable networks were available to cable operators during the 1998-1999 period.[182] There were, indeed, more cable networks available during the 1998-1999 time period than the number of cable channels cable systems had to fill.[183] Dr. Hazlett conceded that the availability of these new networks provided new choices to cable operators in terms of how they filled their channel capacity.[184] Many witnesses testified that having these new cable networks had an effect on the extent to which cable operators carried distant signals.[185] Dr. Crandall testified with respect to cable networks that a cable operator would make a decision regarding carriage based upon his or her evaluation of whether the addition of the cable network is worth it from a profit-maximization perspective, as compared with other

---

180 Tr. 996-998 (Hazlett).

181 Tr. 1108-1109 (Hazlett); NAB 1998-1999 Exhibit 5-X.

182 Tr. 425 (Trautman); Tr. 6106 (Allen); Tr. 1299-1301 (Egan).

183 Tr. 1109 (Hazlett).

184 Id.

185 Tr. 1109 (Hazlett); Tr. 5441-5442 (Bennett); Tr. 1495 (Travis).

alternatives.[186] Similarly, former cable operator June Travis testified that with the increase in cable networks between 1990-1992 and 1998-1999, it is possible that some cable operators may have added one of these new cable networks in lieu of adding a distant signal or even in place of an existing distant signal.[187]

83. A convenient test of Dr. Hazlett's fundamental premise was presented in 1998-1999, when subscribership rose but no other changes occurred.[188] Dr. Hazlett's analysis would predict an increase in the royalty funds due to the increase in subscribers.[189] But the royalty fund experienced essentially no increase between 1998 and 1999.[190]

---

186 Tr. 673 (Crandall).

187 Tr. 1495 (Travis).

188 Tr. 967-970 (Hazlett).

189 Tr. 968 (Hazlett). Form 3 subscribership increased by 2% between 1998 and 1999, from 58.5 million to 59.5 million. Id.; Testimony of Dr. Thomas Hazlett at 10 & n.3.

190 Tr. 968-970 (Hazlett). Dr. Hazlett testified on redirect that, based on Cable Data Corporation printouts he was shown, the Form 3 royalties increased by over $5 million between 1998 and 1999. Tr. 1262-1263 (Hazlett) (based on NAB 1998-1999 Exhibit 12-X). But the witness from Cable Data Corporation testified that where there was a discrepancy between Cable Data Corporation numbers and the Copyright Office's numbers, the Copyright Office's receipts reports are the accurate accounting of total royalties paid for the particular year. Tr. 7093 (Martin). According to the Copyright Office receipts reports, the total cable royalties for both 1998 and 1999 were $108.2 million, essentially no increase at all. See Testimony of Dr. Thomas Hazlett at 4.

ii) 3.75 Fund Mistake

84. Dr. Hazlett also attributed a portion of the reduction in the 3.75 royalty funds to the regulatory changes that occurred in 1993 and 1994.[191] As with the Basic Fund royalties, he began with a hypothetical "baseline" expectation for the 3.75 fund, based again on the premise that the royalties would have increased in direct proportion to the increase in subscribers.[192] Dr. Hazlett further assumed that subscribers receiving a "3.75" signal increased by the same 24% by which overall Form 3 subscribers had increased.[193] But he admitted, after reviewing the actual data, that there had been no general pattern of increases in 3.75 subscribers over the years.[194] Dr. Hazlett conceded that if the number of Form 3 subscribers receiving 3.75 signals did not increase, there would be no projected increase in the 3.75 royalty fund.[195]

85. Moreover, Dr. Hazlett conceded that the 3.75 subscribers actually declined, by roughly half, at the beginning of 1998.[196] He attributed this decline,

---

191 Testimony of Dr. Thomas Hazlett at 30-35.

192 Id. at 31 (projecting that the 3.75 Fund would have grown to $56.1 million by 1998).

193 Tr. 999 (Hazlett).

194 Tr. 1007-1009 (Hazlett) (reviewing NAB 1998-1999 Exhibit 12-X).

195 Id.

196 Tr. 1008-1010 (Hazlett).

and the corresponding decline in 3.75 royalties, to the dropping of superstations WTBS and WWOR.[197] Dr. Hazlett also conceded that the way 3.75 signals were reported was changed due to an unrelated regulatory change as of January 1, 1998.[198] This additional regulatory change would have had the effect of reducing the 3.75 royalties paid by cable systems, but Dr. Hazlett ignored this change for purposes of his analysis.[199]

iii) Rate Regulation

86. Dr. Hazlett seeks to attribute to commercial and public TV broadcasters all responsibility for whatever portion of the reductions in the 1998-1999 royalty funds might somehow be linked to the legislative changes of the 1992 Cable Act and the 1994 Satellite Home Viewer Act.[200] He admitted, however, that the broadcasters did not go to Capitol Hill and say that they would take less in compulsory license royalties in exchange for legislative changes.[201] Indeed, the Consumer Federation of America, the National Consumers League, the National

---

197 Tr. 1010-1011 (Hazlett). Dr. Hazlett also insisted that 1993 rate regulation was somehow responsible for the drastic 1997-1998 decline in 3.75 royalties, Tr. 1011, but he was forced to concede that rate regulation would not have had such an effect. Tr. 1011-1017 (Hazlett).

198 Tr. 1023-1026 (Hazlett); NAB Demo 3.

199 Tr. 1026-1027 (Hazlett); NAB Demo 3.

200 Testimony of Dr. Thomas Hazlett at 7-8.

201 Tr. 1240-1241 (Hazlett).

League of Cities, and the National Council of Mayors, among other groups, all supported rate regulation for cable in 1992.[202]

87. In the 1992 Cable Act, two express findings of Congress were that cable rates had been increasing since deregulation at a rate exceeding inflation, and that in general cable systems did not face adequate local competition and thus possessed undue market power.[203] Dr. Hazlett agreed that during the period following the cable deregulation of 1984, in most markets cable operators did not face a single competitor who was offering multi-channel video programming.[204] He further agreed that extra-competitive rates were being charged by cable companies between 1984 and 1992.[205] In general, the purpose and effect of rate regulation was to bring monopolistic rate increases back to the levels that had prevailed prior to deregulation.[206]

---

202 Tr. 1060-1061 (Hazlett).

203 Tr. 1048-1049 (Hazlett); NAB 1998-1999 Exhibit 8-X. Dr. Crandall also admits that there had been numerous consumer complaints concerning the continuing substantial increases in cable subscription prices and rates. Tr. 10165 (Crandall).

204 Tr. 1051 (Hazlett).

205 Tr. 1063 (Hazlett).

206 Tr. 1050-1053 (Hazlett); see NAB 1998-1999 Exhibit 13-X.

88. The principal interest of commercial broadcasters in connection with the 1992 Cable Act was to assure carriage of stations by the cable systems located within their local markets.[207] In a 1989 congressional hearing, NAB President Edward Fritts stated that "if reasonable must carry and channel repositioning rules are adopted, the broadcasting industry should have no direct interest in whether cable's rates are re-regulated."[208]

89. Cable rate regulation lowered the rate for the basic cable service tier, which is required to be purchased by all cable subscribers before they can purchase the expanded basic tier, the premium channels, and pay-per-view services.[209] But apart from rate regulation rules, Dr. Hazlett agreed that cable operators are likely to decide how to price their basic tiers in a strategic way, which might maximize the cable operator's profits even while producing a decline in the royalty fund.[210] Dr. Crandall concurred that it could be a prudent business strategy for a cable operator, in order to sell additional subscriptions, to offer its basic service at a loss to attract additional subscribers to premium channels and pay-per-view services.[211] Dr.

---

207 Tr. 713-714 (Crandall).

208 Tr. 1244-1245 (Hazlett); NAB 1998-1999 Exhibit 17-X.

209 Tr. 1056 (Hazlett).

210 Tr. 1058-1059 (Hazlett).

211 Tr. 10182-10184 (Crandall).

Hazlett made no effort to examine whether the number of basic-service-only subscribers had increased after rate regulation.[212]

90. The rate regulation rules permitted superstations to be carried in tiers above the basic service tier.[213] If a cable operator carried superstations in its expanded basic tier, all its reserves from that tier would be added to the "gross receipts" on which its royalties were calculated, thus increasing its royalties.[214] In the years immediately after rate regulation first went into effect, there was a marked increase in carriage of superstations, and a corresponding increase in the royalty funds.[215] Dr. Crandall agreed that it was possible that these increases reflected a cable operator's tiering and pricing strategy that maximized both total reserves and cable royalties, notwithstanding rate regulation.[216]

iv) Must Carry Rules

91. The must carry rules under the 1992 Cable Act allowed local broadcast stations to require cable systems in their ADI (area of dominant influence) to carry

---

212 Tr. 1069 (Hazlett).

213 47 C.F.R. § 76.901(a); Tr. 1998-1999 (Ducey); see Tr. 10184-10187 (Crandall).

214 Tr. 1998-1999 (Ducey); see 10186-10187 (Crandall); NAB Demo 3.

215 NAB 1998-1999 Exhibits 1, 3; Testimony of Dr. Thomas Hazlett at 4, Figure 1.

216 Tr. 10187-10188 (Crandall).

them, if the cable operator otherwise refused to do so. Dr. Hazlett admitted that the must carry provisions of the 1992 Cable Act had nothing at all to do with the carriage of distant signals themselves.[217] He nonetheless surmised that the must carry rules tended to crowd out distant signals, and as a result reduced the amount of distant signal carriage and, hence, the royalty fund.[218]

92. Dr. Hazlett first compared data for 1992 and 1998 on the average total number of broadcast stations carried by Form 3 systems. Whereas the average total number of stations for those two periods was essentially the same at 10.8, the composition changed, with the average number of distant signals falling from 3.3 in 1992 to 1.8 in 1998, and local broadcast stations increasing from 7.5 to 9.0.[219] But comparing 1992 with 1993, the period in which the must carry rules actually went into effect, the average number of broadcast stations carried by Form 3 systems increased, from 10.8 to 11.4, while the number of distant signals remained constant at an average of 3.3.[220] Thus, the relevant evidence demonstrated, contrary to Dr.

---

217 Tr. 1245-1246 (Hazlett).

218 Tr. 876-877 (Hazlett); Testimony of Dr. Thomas Hazlett at 15-17.

219 Testimony of Dr. Thomas Hazlett at 17, Figure 5; Tr. 1088-1089 (Hazlett).

220 Tr. 1089 (Hazlett); NAB 1998-1999 Exhibit 14-X. JSC make the false statement that the must carry rules "became effective *during the 1993-2 period*," and argue that the effect of the rules couldn't have been seen until 1994. JSC PF at 195-196 n. 61 (emphasis in original). The truth is that the must carry obligations were made effective for commercial station carriage as (continued...)

Hazlett's supposition, that distant signals were not "squeezed out" by the addition of new local stations in response to the statutory must carry requirement.[221]

93. Dr. Hazlett admitted that even if a distant signal were to be "squeezed out," it would reflect not only the addition of the local channel, but also an affirmative decision by the cable operator to drop that distant signal, as opposed to dropping a non-broadcast channel.[222]

94. Furthermore, the overall channel capacity of Form 3 systems increased, on average, by over 13 channels between 1992 and 1997 and by nearly 17 channels between 1992 and 1998.[223] This increase in channel capacity by cable systems, which was due to a massive effort centered on rebuilding and increasing

(...continued)

of June 2, 1993, which is in the 1993-1 accounting period. 47 C.F.R. § 76.56(b). Thus, all cable systems were required to have added any commercial must carry stations before the beginning of the 1993-2 period, and the complete effect of the rules -- an increase in the number of local stations without any decrease in distant signals -- was revealed in the 93-2 data Dr. Hazlett ignored.

221 The change between 1992 and 1998 occurred principally between 1997 and 1998, with the loss of superstations WWOR and WTBS. Tr. 902-903 (Hazlett); NAB 1998-1999 Exhibit 16-X.

222 Tr. 1184-1185 (Hazlett).

223 Tr. 1093-1094 (Hazlett); NAB 1998-1999 Exhibit 15-X. Channel capacity is measured by average number of activated channels, as reported by cable systems in their SOAs. Tr. 1091-1093 (Hazlett); NAB Demo 3.

capacity for cable systems,[224] far exceeded the overall increase of 1.5 in the average number of local stations carried between 1992 and 1998.[225]

95. Judith Allen, a cable operator at Century Communications from 1992 to early 1998, speculated that distant signals may have been crowded out by the must carry rules of the 1992 Cable Act because of limitations that the cable operator had as to channels on the basic tier.[226] However, Ms. Allen was unable to provide any evidence of such a phenomenon having occurred,[227] or of her company's having had to add a must carry signal and drop a distant signal.[228] An examination of the statement of account data for a number of cable systems owned by Century demonstrated that the systems added or dropped distant signals for various reasons that had nothing to do with any regulatory or legislative change.[229] Ms. Allen agreed that during the 1992-1998 period, many other cable systems would likely

224 Tr. 6068 (Allen).

225 See NAB 1998-1999 Exhibit 16-X.

226 Tr. 6013-6015 (Allen).

227 Tr. 6035-6036, 6038-6039 (Allen).

228 Tr. 6066 (Allen).

229 Tr. 6080, 6086, 6098-6100 (Allen); NAB 1998-1999 Exhibits 28-X; 29-X; 30-X.

have been making similar changes to their distant and local signal carriage that would have had nothing to do with the must carry rules.[230]

96. JSC also make the truly nonsensical argument that the regression analysis presented by Dr. Rosston somehow supports their argument about the effect of the must carry rules, because the coefficient for the number of local channels is inversely related to royalties.[231] They misread the regression analysis, which does not provide information about how royalties may have changed over time as the number of local channels increased between 1992 and 1998. Instead, the regression measures the differences in royalties paid in 1998-1999 by various Form 3 systems with different levels of local signals.[232] It is not surprising that systems in larger markets, with more local stations already available to subscribers free over the air, might tend to have lower subscriber receipts, and pay lower royalties, for the carriage of additional stations imported from distant markets. But that fact provides no support for JSC's groundless theory about the impact of the must carry rules on the overall size of the royalty fund.

---

230 Tr. 6102 (Allen).

231 JSC PF ¶ 308.

232 See Tr. 2616-2617 (Rosston).

97. It should be noted that the sports leagues themselves sought the right from the FCC to seek expansions of the areas within which stations could assert must carry rights under the rules implementing the 1992 Cable Act.[233] The NHL and the NBA argued that the local broadcast market doesn't necessarily correspond to what sports franchises view as their markets, and they wanted the ability to request that a station's market be changed by regulation to conform with the geographical dimensions of the sports teams' markets.[234] The leagues explained that they would want the right to seek to expand the must carry rights of, for example, Philadelphia stations so that they could require cable operators in New Jersey to carry them.[235] A Philadelphia station could, of course, be carried as a distant signal there, but the NBA and NHL were seeking a way to require carriage under the must carry rules,[236] which, if successful, would have had the effect of reducing the distant signal royalty funds.

---

233 NAB 1998-1999 Exhibit 56-RX.

234 Tr. 10201 (Crandall); NAB 1998-1999 Exhibit 56-RX.

235 Tr. 10201-10202 (Crandall); NAB 1998-1999 Exhibit 56-RX.

236 Tr. 10202 (Crandall).

v) 1994 Satellite Home Viewer Act

98. JSC next argue that broadcaster support for the 1994 Satellite Home Viewer Act should somehow be taken into account in setting the royalty awards.[237] That Act, among other things, amended the definition of the local service area of a broadcast television station under Section 111 so that it would match the local market within which the new FCC must carry rules applied.[238] The Act eliminated the anomaly that occurred where a station was eligible for local must carry rights within its ADI, but was still considered distant for compulsory license purposes.[239] JSC present no evidence that either they or Program Suppliers opposed this "conforming amendment" to the Copyright Act, even though they argue it had the effect of reducing the size of the royalty fund.

99. Dr. Hazlett mischaracterized the 1994 Satellite Home Viewer Act as "essentially expanding must carry" by creating larger areas over which broadcast stations would be eligible for must carry rights.[240] In actuality, of course, must carry rights were not expanded by the 1994 Act. Dr. Hazlett nonetheless claimed that the impact of the Act can somehow be measured by a reduction between 1992

---

237 JSC PF at ¶¶ 309-310.

238 17 U.S.C. § 111(f).

239 Tr. 1107, 1113 (Hazlett).

240 Tr. 883 (Hazlett).

and 1997 in the number of reported DSEs, purportedly resulting in a decrease in distant signal royalties.[241] But he conceded that he had not attempted in any way to confirm that any of the stations he included in his analysis had switched to local status as a result of the Satellite Home Viewer Act, and he had no idea how many DSE drops could actually be attributed to it.[242]

(b) Retransmission Consent

100. Next-to-last on the laundry list of JSC arguments is their brief assertion that broadcasters generally obtained no cash compensation from cable operators in retransmission consent negotiations, and that there should accordingly be some unspecified demerit against the Commercial Television royalty award.[243] JSC have apparently abandoned the contradictory argument pressed by Dr. Hazlett, that broadcasters were too successful in obtaining carriage for co-owned cable networks through retransmission consent negotiations, resulting in a reduction in distant signals and copyright royalties.[244]

---

241 Tr. 883-884 (Hazlett).

242 Tr. 886-887 (Hazlett).

243 JSC PF ¶ 311-313.

244 Tr. 879-882 (Hazlett).

101. JSC now argue that retransmission consent negotiations could be considered by the Panel in determining the "seller's perspective," if the Panel were to determine, contrary to JSC expert Dr. Crandall's view, that it would be possible or appropriate to consider supply side evidence in adjusting the Bortz survey results.[245] JSC point to a few passages of anecdotal and mostly speculative testimony to assert that retransmission consent negotiations for distant signal carriage generally did not result in additional cash payments to broadcasters.[246] But this testimony was inconclusive at best.[247] Indeed, JSC cable operator witness Ms. Allen testified as follows:[248]

> Q. [A]re you aware of any compensation or consideration that might have been provided by Century in exchange for retransmission consent for carriage of a station on a distant signal basis?

---

245 JSC PF at ¶ 313; see Tr. 10244-10245 (Crandall).

246 JSC PF at ¶ 312 (citing Hazlett W.D.T., Allen W.D.T., Alexander oral testimony, and Egan W.D.T.).

247 Tr. 881-882 (Hazlett) (admitting he did not have data about distant retransmission consent negotiations); Tr. 6064-6065 (Allen) (admitting that she was not involved in or aware of distant signal retransmission consent negotiations, and that system managers may well have agreed to pay compensation for distant signals); Tr. 2298-2299 (Alexander) (stating that local and distant retransmission consent negotiations were handled by CBS corporate offices, and may have resulted in non-cash compensation); Tr. 1398-1399 (Egan) (acknowledging that the compulsory license sets the price for all programs and makes it unnecessary to pay more in retransmission consent negotiations, and that stations receive compensation through the compulsory license system, but only when they grant retransmission consent).

248 Tr. 6065 (Allen).

> A I'm aware that it was our policy not to but that negotiations were happening locally. And it wouldn't surprise me if a local manager agreed to something that we would have preferred he did not do.

102. In any event, the retransmission consent right is expressly not a right to grant copyright licenses, as the 1992 Cable Act states: "nothing in this section shall be construed as modifying the compulsory copyright license established in Section 111 of Title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."[249]

103. Moreover, the sports leagues and program suppliers sought and obtained the right to acquire retransmission consent rights from the broadcast stations.[250] In comments to the FCC, Major League Baseball ("MLB") had requested that the FCC "construe the Cable Act as preserving the absolute right of

---

249 47 U.S.C. §325(b)(6); see Tr. 727 (Crandall); NAB 1998-1999 Exhibit 8-X. It should be noted that cable operators, which generally faced little or no effective multichannel video competition in their markets, had "monopsony" power as buyers of channels. Tr. 10099-10100 (Crandall); see Tr. 1399-1402 (Egan) (explaining that he would simply refuse to pay more for a distant signal). The compulsory license gives them the absolute statutory right to refuse to pay more than the specified royalties for the copyright rights to retransmit distant signal programs, and their monopsony power would generally give them the ability to refuse to pay more for retransmission consent.

250 See NAB 1998-1999 Exhibit 11-X at ¶¶ 172-174.

broadcast stations and copyright owners to freely negotiate and enter into contracts regarding, among other things, the exercise of retransmission consent rights."[251]

104. Tribune Broadcasting Company ("Tribune"), owner of a number of broadcast stations including WGN, argued in its own comments that the FCC should not allow program suppliers the right to control the exercise of retransmission consent rights.[252] Tribune attached a document entitled "Required language for local broadcast contracts, revised April 15, 1992," which included what Tribune identified as representative provisions from recently formed contracts presented by program syndicators and MLB.[253] For Major League Baseball, those provisions stated that:

> If during the term of this Agreement (Rightsholder) gains the right through legislative or administrative action or otherwise, to grant consent to cable system operators and/or other multi-channel programming distributors for the retransmission of its broadcast television signal, (Rightsholder) shall not grant such consent with regard to the games broadcast hereunder without the express written consent of (Club)."[254]

---

251 Tr. 733 (Crandall); NAB 1998-1999 Exhibit 9-X.

252 Tr. 733-738 (Crandall).

253 NAB 1998-1999 Exhibit 10-X; see Tr. 735-736 (Crandall).

254 NAB 1998-1999 Exhibit 10-X at Exhibit A, last page.

105. The language went on to state that "[i]t is understood and agreed that the granting of such consent by (Club) shall be contingent upon the parties hereto reaching an agreement as to the compensation to be paid to club in consideration of its consent."[255] The Tribune Comments noted similar provisions from program syndicators such as Columbia Pictures, Paramount, MGM-Pathe, Carolco, Viacom, Republic, Buena Vista, and Twentieth Century Fox, which prohibited the station from allowing retransmission of programs by cable systems or required compensation received for retransmission consent to be paid over to the syndicator.[256]

106. The FCC decided in favor of the syndicators and sports leagues on the issue, adopting a rule that allows such program suppliers essentially to take over the broadcast station's full–signal retransmission consent rights by agreement.[257] But JSC offered no evidence in this proceeding that any sports interest or other program supplier ever collected cash compensation for the granting of any distant signal retransmission right they had acquired under this rule.

---

255 Id.

256 NAB 1998-1999 Exhibit 10-X at 11 and n. * and Exhibit A. A provision that requires any compensation won by the station in exchange for granting retransmission consent to be paid over to the syndicator would presumably eliminate any commercial incentive for active pursuit of such compensation by the broadcaster.

107. Thus, even if JSC had established as a factual matter that no separate compensation was obtained in 1998 and 1999 for retransmission consent for distant signal carriage, any adverse "seller's perspective" inference would have to be applied against JSC and Program Suppliers, who fought for the right to control the retransmission consent negotiations but have not shown that they obtained any cash compensation for it.

108. In fact, of course, broadcast stations do obtain cash compensation, in the form of copyright royalties, only by granting distant retransmission consent rights.[258] By granting consent, broadcast stations permitted the carriage of distant signals, thereby increasing the royalty funds and making it possible for all the claimant groups, including themselves, to seek a share of those royalties for their programs based on their relative marketplace value.[259]

(c) The Compulsory License

109. JSC finally claim that NAB has in the past supported maintaining the compulsory license, and that this is indicative that broadcasters would seek a lower

(...continued)

257 47 C.F.R. § 76.64 (1994); Tr. 738-742 (Crandall); NAB 1998-1999 Exhibit 11-X at ¶¶ 173-174.

258 Tr. 1399 (Egan); See Tr. 9077 (Joskow).

259 Tr. 1399 (Egan).

royalty share in a hypothetical "free" market.[260] But JSC mischaracterize the document on which the claim is based. NAB President Mr. Fritts actually testified only that the removal of the compulsory license would result in significant dislocations in the marketplace,[261] since the compulsory license allows cable systems to retransmit local television stations.[262] Mr. Fritts concluded nonetheless that "[i]t is also appropriate for this Subcommittee to consider more sweeping changes, including the possibility of a transition to a marketplace with full copyright liability for the programs on retransmitted broadcast signals."[263] Again, the record evidence simply does not support the adverse inference JSC propose.

c. Evidence Supporting Downward Adjustments for Program Suppliers and JSC

110. By contrast with the lack of evidence, discussed above, showing any interest of broadcasters in accepting less than their full royalty share in a hypothetical free market, there is substantial record evidence of such interests on the part of Program Suppliers and JSC. If the Panel were to ignore all expert testimony on the issue and decide to apply "seller's side" adjustments to the Bortz

---

260 JSC PF ¶ 314.

261 Tr. 10278 (Crandall); JSC Ex. 6-R at 191.

262 Tr. 10278-10279 (Crandall).

Survey results, it should do so with respect to those two claimant groups and not Commercial Television.

111. JSC point to the 1989 Proceeding, in which they suggest that the CRT put the "seller's side" into practice in awarding the Devotional Claimants less than their Bortz share.[264] There, the CRT had evidence that Devotional program syndicators sometimes actually paid for carriage of their programs on broadcast stations.[265] Thus, it concluded that the "price" cable operators would have to pay in the marketplace would be lower than the 4% share measured by the Bortz study.[266]

112. In this proceeding, the only evidence of a similar practice came from the sole program syndicator witness actually presented by Program Suppliers, Babe Winkelman. Mr. Winkelman testified that he buys time on television stations in order to get his programs on the air in markets he wants and to control all

---

(...continued)

263 JSC Ex. 6-R at 191. Mr. Fritts urged that Congress should, before committing itself to elimination of the compulsory license, fully evaluate the impact of such a change on all aspects of the industry. Id. at 191-192.

264 JSC PF at ¶ 66.

265 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15303 (Apr. 27, 1992).

266 Id.

advertising sales in the programs.[267] He also described the fact that he actively seeks the widest possible coverage, including on distant signal superstation WGN.[268] He does not exercise his right to license the program on a syndicated exclusivity basis, but instead allows it to be aired on multiple stations.[269] He prefers simultaneous carriage of the program in multiple markets, and buys time to accomplish that situation, because he can better sell advertising under those circumstances.[270]

113. Similarly, Program Suppliers witness Howard Green testified about the great increase in the practice of licensing syndicated programs on a barter basis.[271] Barter licensing replaces some or all of the cash license fees with advertising time.[272] In a barter situation, the syndicator maximizes its revenue by having the widest possible carriage of the program, since it sells advertising on a national basis to national advertisers.[273] This is made possible in part by the availability of the Nielsen national meter sample viewing data, which capture both

---

267 Tr. 6285-6287 (Winkelman); Testimony of Babe Winkelman at 6-7.

268 Tr. 6304-6305 (Winkelman).

269 Tr. 6309-6310 (Winkelman).

270 Tr. 6304-6305, 6311 (Winkelman).

271 Tr. 6625 (Green) ("virtually every program that's sold in first-run syndication is sold on a barter basis.")

272 Tr. 6651-6654 (Green).

local-market and distant-signal viewing to the syndicated program nationwide.[274] As he and other witnesses testified, it is not possible for the broadcast stations to earn revenues for distant retransmissions of a barter program, even though they may have inserted advertising in the program, because they sell to local advertisers, who will not pay for distant audiences.[275] At the same time, barter syndicators actively seek over 80% national clearance of their programs, so they can sell advertising on a national basis.[276]

114. Thus, Program Suppliers would have a powerful incentive to offer their programs at a low or zero license fee, in order to maximize their coverage and thus their national advertising revenues. Some Program Suppliers even pay to get their programs on the air, also in order to maximize their advertising revenues. If the Panel were to expand the 1989 CRT decision regarding Devotional Claimants programming, the Program Suppliers' share in the Bortz Study should be substantially reduced before using it to set their award.

(...continued)

273 Tr. 6625-6626 (Green).

274 Tr. 7286-7287 (Lindstrom); Testimony of Paul Lindstrom at 3, 5-6; See Tr. 6689-6690 (Green).

275 Tr. 6695-6696 (Green); Tr. 2294-2298 (Alexander); Tr.6954 (Carey).

276 Tr. 6625-6626 (Green).

115. There is similar evidence in the record regarding JSC. As Mr. Tagliabue testified, the NFL was concerned when licensing the NFC games package to Fox about the extent of Fox's coverage of U.S. television households.[277] Indeed, the NFL evaluated the extent of carriage of Fox stations on cable systems before agreeing to sell Fox those rights.[278] In addition, the NFL's license fees are directly affected by projected advertising revenues that can be earned by the broadcast network licensees.[279] In this way, the NFL has interests directly comparable to the Program Suppliers in maximizing carriage, audience, and ultimately revenues from the distribution of their licensed games. And as with Program Suppliers, any "seller's side" downward adjustment based on the interest of the program seller in maximizing its revenues by maximizing carriage should be applied to JSC as well.

116. Moreover, as Dr. Joskow pointed out, the compulsory license system has been in operation for nearly 25 years, and the suppliers of programs to broadcast stations have long been in a position to understand and take account of the implications of distant signal carriage of their programs.[280] In this free marketplace, program suppliers such as JSC may decide whether and under what

---

277 Tr. 155-158 (Tagliabue).

278 Id.

279 Tr. 149-155, 161 (Tagliabue).

280 Rebuttal Report of Dr. Andrew S. Joskow at 5-6.

conditions to license their programs, including which station to license, what price to charge, and whether to license into the broadcast market at all (e.g., by licensing to a regional cable sports network).[281] They may, and presumably have, considered historical or potential cable carriage of the various stations in making these free-market choices.[282] Sports teams also had the right to negotiate for retransmission consent rights and to prevent any distant signal carriage if it was important to them.[283] To the extent sports programs were carried on distant signals in 1998 and 1999, it may be presumed that the teams or leagues decided that their economic interests were better served by licensing the programs to those stations, notwithstanding the below-market compensation that would come from this royalty distribution proceeding. These market-proven counterbalancing economic interests of the JSC should be taken into account if the Panel were to consider "seller's side" adjustments to the Bortz shares.

117. In addition, the same rationale that underlay the exclusion of network programming from eligibility for compulsory license royalties should apply to reduce JSC's royalties here. As Congress stated, no royalties should be paid to the owners of programs licensed for distribution on the then-three national networks because

---

281 Id. at 6.

282 Id.

283 See discussion of Retransmission Consent rules supra.

"[t]he copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly."[284] In the same way, the NFL has already been fully compensated by Fox for reaching the entire nation.[285] Very little credit, if any, should be accorded to programs licensed to Fox in assessing the royalty award for JSC. The same holds true with respect to syndicated programs licensed on a national basis to Fox, about which Mr. Green testified.[286]

118. There is also evidence supporting a downward adjustment for the JSC share based on the other side of the "seller's perspective" coin. A central aspect of considering any hypothetical differences in seller's motivations to sell programs into the distant signal marketplace is to consider whether they would sell at all. If the "forced sale" aspect of the compulsory license is not incorporated into the model of

---

284 PS Demo 21 at 265.

285 Tr. 158-159 (Tagliabue) Indeed, Commissioner Tagliabue testified that the NFL would not even consider licensing the games to any cable operators who could not receive a Fox signal, because it had sold national exclusive rights to Fox. Id.

286 Tr. 6629-6630, 6670, 6671 (Green). In this regard, we are not arguing that the FOX programs should be considered non-compensable network programs, as JSC argued unsuccessfully before the previous CARP. Instead, the legislative history makes clear that the compensation for programs licensed for nationally exclusive broadcast network exhibition has already been received in the free marketplace, and the record supports a very deep discount against such programs' claims to a share of the compulsory license royalties.

the "free" market the Panel is attempting to replicate, it would be possible to conclude that some of the programs actually retransmitted in 1998-1999 would not have been retransmitted at all. And the evidence suggests that JSC programs would have been among those eliminated if no such constraints were considered in the hypothetical distant signal marketplace.

119. Commissioner Tagliabue, for example, testified that the NFL simply would not agree to license games to cable operators, because its revenues were maximized by licensing those games to broadcast and cable networks on a nationally exclusive basis.[287] The increase in the number of baseball games licensed to regional cable networks rather than broadcast stations[288] also reflects a preference to move games from distant signals to more profitable distribution channels. The general monopoly power exercised by the sports leagues under antitrust law exemptions[289] would allow them to refuse to sell their programs as part of distant signals at a price that cable operators would be willing to pay.[290] Rather than supporting the award to JSC of their Bortz share, the full implications

---

287 Tr.158-161 (Tagliabue).

288 NAB 1998-1999 Exhibit 53-RX; See Tr. 10092-10093 (Fuller).

289 NAB 1998-1999 Exhibit 7-X; See Tr. 679-681, 10108 (Crandall).

290 See Tr. 1486-1487 (Travis) (asserting that cable operators supported the compulsory license so they wouldn't have to pay higher prices for sports programs).

of the "seller's side" analysis would properly result in a smaller share or a zero share to reflect the likely reduction in the number of sports programs on distant signals in a hypothetical "free" marketplace. As the former President of the National Cable and Telecommunications Association testified in the 1990-1992 proceeding, "absent the compulsory license, a distant signal . . . would not as a practical matter have the ability to contract for national distribution of an individual team's sports programming."[291]

2. Changed Circumstances

120. JSC argue that the changed circumstances evidence does not support an increase in the Commercial Television share[292] but does support an increase in the JSC share.[293] JSC are wrong on both counts.

a. Changed Circumstances Support an Increase in the Commercial Television Share

121. JSC argue that certain evidence demonstrates a declining value for NAB programming between 1992 and 1998-1999. However, the Bortz surveys, which measure relative market value among the claimants in this proceeding,

---

291 1990-1992 Direct Testimony of JSC witness James P. Mooney, June 16, 2003 Incorporated Testimony, Vol. 5 of 5 at Tab 29, p. 10.

292 JSC PF at ¶¶ 315-322.

293 Id. at ¶¶ 259-280.

would presumably already have taken account of any of these changes in terms of their effect on marketplace value. As explained by witnesses in this and prior proceedings, cable operators are knowledgeable about what they carry, and are able to determine the relative value of programming on their system as of the time of the survey.[294] Any upward or downward change in the value of the claimants' programming would be reflected in the results of the Bortz survey.

(1) WTBS and WWOR

122. JSC begin by arguing that the loss of WTBS and WWOR should somehow result in a decrease in NAB's share because there was some Commercial Television programming on those two stations.[295] But the royalty allocations are based on <u>relative</u> market value, and the simple fact is that WTBS and WWOR were much more substantial parts of the JSC and Program Suppliers awards in past years.[296] Thus, in effect, whatever superstation programming Commercial

---

294 NAB PF at ¶ 112; JSC PF at ¶¶ 39-41.

295 JSC PF at ¶¶ 316-319.

296 Using the data provided in NAB 1998-1999 Exhibits 5 and 6, WTBS alone represented 42% of JSC's subscriber-weighted programming time share in 1992, compared with 44% of Program Suppliers' and 27% of Commercial Television's. (This is calculated by multiplying each category percentage on WTBS by its overall weight of 39%, from Exhibit 6, and then dividing the resulting percentage by the total 1992 share for that category from Exhibit 5. For JSC's data this calculation is as follows: 5.2% x 39%/4.8% = 42%). WWOR data are not available in the record for Program Suppliers and JSC.

Television may have "lost," Program Suppliers and JSC lost more, and Commercial Television's <u>relative</u> share has increased.[297]

123. In any event, NAB is not requesting an increased share based quantitatively on the increased relative time percentage its programming represents after the loss of WTBS and WWOR. Instead, it is asking for an award equal to its Bortz share, as adjusted, which provides the most appropriate measure of relative marketplace value in 1998 and 1999. To whatever extent the changed circumstances cited by JSC affected the relative marketplace value of NAB's programming between 1992 and 1998, that effect is already reflected in the increases in the Commercial Television share as measured by the Bortz Study and the Nielsen viewing studies.

(2) Network Affiliates

124. JSC next claim that a supposed decline in the carriage of network affiliates should hurt the NAB claim, based on the premise that network affiliates

---

297 JSC in particular consistently claimed that these superstations were primarily valued for their sports programs, and that their increasing prominence should result in higher royalty awards. JSC 1990-1992 PF at ¶¶ 273-280; 1990-1992 Direct Testimony of JSC witness Dr. Peter Lemieux, JSC June 16, 2003, Incorporated Testimony, Vol. 5 of 5 at Tab 36, pp. 27-28. The increases NAB received in prior proceedings were won despite, not because of, WTBS's increasing dominance of the distant signal marketplace.

have been an important part of NAB's claim in the past.[298] While the total number of network affiliate distant carriage instances decreased slightly between 1990-1992 and 1998-1999, however, the relative percentage of network affiliate distant carriage has greatly increased since the 1990-1992 period, because of the radically greater reduction in independent station carriage due to the loss of WTBS and WWOR.[299] JSC also note that 40% of the carriage of distant network signals were "partially distant."[300] This would not appear to be a basis for discounting NAB's claim,[301] however, since partially distant signals are closest to their home markets, where station-produced news and public affairs programs have even greater value.[302]

---

298 JSC PF at ¶ 320.

299 NAB 1998-1999 Exhibits 2, 3.

300 JSC PF at ¶ 320.

301 JSC and Program Suppliers have made the argument that an increase in partially distant carriage somehow reflects a distortion introduced by the must carry rules, but for network affiliates, the data show there was no increase whatsoever in partially distant carriage as a result of those rules. Tr. 10494-10497 (Gruen) (no increase between 1992 and 1997). Moreover, over 45% of the distant carriage of non-superstation independent stations was on a partially distant basis in 1998. Testimony of Dr. Thomas Hazlett at Appendix D.

302 In the CRT's 1989 decision, a decline in the relative proportion of distant network affiliates was cited as a basis for discounting the impact of NAB's increased "clustering" showing, but the CRT specifically found support for its conclusion in a corresponding decline in NAB's Nielsen viewing share, to 6.3%. <u>1989 Cable Royalty Distribution Proceeding</u>, 57 Fed. Reg. 15286,

(continued...)

(3) Superstation Program Time

125. JSC next assert that the increase in overall distant signal programming time for NAB was due to an increase in the percentage of its programming represented by superstation news and public affairs shows.[303] They base this claim on a peculiar set of analyses that use program categorizations supplied by TVData, which were not used in any other part of the case, and misleadingly illustrate supposed program differences across the years broken down by these subcategories.[304] The chart itself, however, shows only that NAB's overall percentage of subscriber-weighted distant signal programming time rose significantly between 1992 and 1998, and that 59% of that time was accounted for by superstations in 1992, compared with about 61% in 1998.[305]

126. But the premise of their argument is wrong in any case. They cite the CRT's 1989 decision for the supposed proposition that superstation news and public

(...continued)

15303 (Apr. 27, 1992). In 1998-1999, however, NAB's viewing share doubled, to 14.8%. No such discount would thus be appropriate.

303 JSC PF ¶ 321.

304 Id.; JSC Exhibit 12-X. The TVData categorizations heavily affect the results, since, for example, 100% of the station-owned programming on WTBS in 1992 was categorized as "Other," see JSC Exhibit 10-X, and WTBS was the most widely carried distant signal by far, with the highest subscriber weight.

305 See JSC Exhibit 12-X (5.17%/8.79% = 58.8% for 1992; 7.90%/13.0% = 60.8% for 1998).

affairs programming has "little or no value outside its region."[306] But in the 1990-1992 proceeding, JSC's witness Dr. Peter Lemieux demonstrated that the geographic distribution of WGN's distant carriage, unlike WTBS's, was heavily concentrated within nearby sections of the country, making it the most regionally carried major superstation.[307] Dr. Lemieux noted that "[c]arriage of WGN is more extensive in the central regions around Chicago, with disproportionately less carriage along both coasts."[308] Even though WGN's carriage increased somewhat between 1990-1992 and 1998-1999, it still had not come close to reaching the nationwide carriage WTBS previously had seen.[309] In short, WGN's news and public affairs programming had substantial value within the region in which it was most heavily carried, and even beyond.[310] JSC's argument that there was a slight

---

306 JSC PF at ¶ 321. The CRT did not actually make such a finding, but instead noted that it had credited the regional appeal of NAB's programming within the general 150-mile region as to which NAB had showed increased clustering. 1989 Cable Royalty Distribution Proceeding, 57 Fed. Reg. 15286, 15303 (Apr. 27, 1992).

307 1990-1992 Direct Testimony of JSC witness Dr. Peter Lemieux, JSC June 16, 2003 Incorporated Testimony, Vol. 5 of 5 at Tab 36, p. 27-28; See 1990-1992 CARP Report at 105.

308 Id.

309 See NAB 1998-1999 Exhibit 4.

310 Statement of Dr. Richard V. Ducey at 16-17; NAB 1998-1999 Exhibit 8; Tr. 3363-3364 (Fuller) (some of the content of the WGN news may be national in scope, which "would probably have some appeal, no matter the location in the United States," and WGN's 9:00 evening news program would have value to subscribers because it was earlier than in most markets).

increase in the contribution of superstation programming to NAB's overall programming percentage is meaningless when the superstation is WGN rather than WTBS.

127. Furthermore, any change along these lines that might have affected the overall value of NAB's programming to cable operators would already be taken into account by the Bortz cable operator survey, which showed an increase in the News and Public Affairs share between 1992 and 1998.[311]

(4) Regional Cable News Networks

128. JSC finally assert that the number of regional cable news networks rose during the 1990s.[312] But those networks had small numbers of subscribers and were not significant competitors of broadcast news.[313] Indeed, based on Program Suppliers' Exhibit 13-X, most of the regional news networks are owned by local broadcasters, who do not directly compete with their own broadcast news programs in the market.[314] NAB witness Marcellus Alexander agreed that the regional news networks would provide "a supplement and not a replacement" to the local

---

311 NAB PF at ¶ 116.

312 JSC PF at ¶ 322.

313 Tr. 2325-2326 (Alexander).

314 Tr. 2393-2395 (Alexander); PS Ex. 13-X.

broadcast news.[315] Mr. Alexander also testified that in addition to the fact that regional news networks had a miniscule effect, some of the viewers of regional cable news networks may not necessarily siphon from broadcast news at all.[316] Program Suppliers' Exhibit 13-X characterized regional cable news networks as not competing "head-to-head" in terms of ratings with local broadcasters, and Mr. Alexander explained why that was the case, based on his specific experience in the Philadelphia market.[317] Although overall viewing to station news may have declined between 1992 and 1998, for whatever combination of reasons,[318] the relative viewing levels of Commercial Television news and other programs in the distant signal marketplace doubled in the Nielsen viewing study between 1990-1992 and 1998-1999.[319]

---

315 Tr. 2395 (Alexander).

316 Tr. 2327-2328 (Alexander).

317 PS Ex. 13-X; Tr. 2326-2327 (Alexander). Moreover, most of the markets in which regional news networks have been launched are larger cities, not markets like Wilkes Barre/Scranton, where Mr. Alexander's station's news would have been most valued by subscribers. Statement of Marcellus Alexander, Jr., at 2-4.

318 Tr. 2388 (Alexander).

319 NAB Demo 21.

129. In sum, none of the purportedly adverse changed circumstances cited by JSC provide any basis for awarding Commercial Television less than its Bortz Study shares.

b. JSC's Changed Circumstances Claims

130. JSC argue that several changed circumstances support an increase in their award. None of these factors is reflected, however, in any increase in the relative market value of JSC's programs. JSC should receive its Bortz share, as adjusted.

(1) Prominence of WGN

131. JSC assert as a changed circumstance that as a result of the TBS conversion to a cable network, WGN became -- by default -- the most widely carried distant signal, and WGN "features highly valuable JSC programming."[320] But Sports programming carried on WGN declined from the 1990-1992 period to the 1998-1999 period. Between 1992 and 1998-99, the total number of Cubs games licensed for broadcast by WGN decreased by 35%, from 140 games in 1992 to 90

---

320 JSC PF ¶ 261-265. JSC describe the change as WGN's "ascension to dominance," id. at ¶ 262, but in fact WGN's carriage increased by only 8% between 1992 and 1998, and its carriage in 1998 was only about 60% of what WTBS's had been. Testimony of Dr. Thomas Hazlett at Appendix D; NAB 1998-1999 Exhibit 4.

games in 1998 and 91 games in 1999.[321] At the same time, the number of Cubs games licensed to regional sports networks in the Chicago area increased from none at all in 1992 to 51 in 1998 and 57 in 1999.[322] White Sox games on WGN increased by a small amount, from 48 in 1992 to 51 in 1998 and 53 in 1999, but most White Sox games remained on regional sports networks (107 in 1992, 101 in 1998, 103 in 1999).[323]

132. In addition, the number of Chicago Bulls games on the distant signal WGN declined between 1992 and 1998-1999.[324] In the 1991-1992 season, WGN telecast 30 Bulls games.[325] In the 1997-1997 season, WGN was only able to telecast 15 Bulls games due to the settlement of litigation that followed the imposition of limitations by the NBA.[326] In the 1998-1999 season, only 13 Bulls games were

---

321 Rebuttal Statement of Dr. Richard V. Ducey at 10. JSC presented evidence during cross-examination that demonstrated that at least 9 games were transferred from Chicagoland to WGN in 1998. That would mean that WGN carried 99 Cubs games in 1998 while Chicagoland carried 48 Cubs games in 1998, which would still be a substantial decrease from the 1990-1992 proceeding.

322 Rebuttal Statement of Dr. Richard V. Ducey at 10.

323 Id.

324 Id. at 11.

325 Id.

326 Id.

telecast on WGN, due to the settlement of the litigation, along with the fact that the NBA lockout wiped away a significant portion of the 1998-1999 NBA season.[327]

133. Furthermore, Michael Jordan retired from the Bulls during the 1998 basketball season.[328] The Bulls, after winning the 1997-1998 NBA championship during Jordan's last (at the time) season, finished poorly (dead last) in the next few seasons.[329] Judith Allen testified that the owners' lockout and the fact that Jordan retired from the Bulls would negatively affect the relative value and attractiveness of Chicago Bulls programming on WGN during the post 1997-1998 season.[330]

(2) Distant Signal Programming Time

134. JSC assert that despite the various substantial changes in the distant signal marketplace, their programs maintained roughly the same percentage share of distant signal program time, as measured by Dr. Fratrik's study.[331] This only demonstrates that there should be no change in the JSC's relative share, a fact also confirmed by the Bortz survey results.

---

327 Id.; Tr. 6120-6122 (Allen).

328 Tr. 6030 (Allen).

329 Tr. 6120 (Allen); PTV Ex. 15-X.

330 Tr. 6123-6124 (Allen).

331 JSC PF at ¶ 266-267.

(3) Fox Programs

135. JSC next tout as a changed circumstance supposedly favoring their claim the fact that JSC programming, particularly NFL games, appeared on the Fox network during 1998 and 1999.[332] NFL programming has been carried on national broadcast network distant signals for many years, but in the 1998-1999 proceeding, unlike prior proceedings, a portion of the distant signal NFL programs were considered non-network programming because they were licensed to Fox, which is excluded from the statutory definition of non-compensable "network programming."[333] JSC claim that the change in status of this programming should have the effect of increasing the value of JSC programming.[334]

136. NFL was and is carried on CBS, ESPN, ABC, and, since 1994, Fox.[335] There is no difference for cable operators in terms of the programs actually available to them since the 1990-1992 proceeding, because although the NFC games switched from CBS to Fox, they all were still broadcast nationally, and nothing has

332 JSC PF at ¶¶ 268-276.

333 Tr. 122-123 (Tagliabue).

334 JSC PF ¶ 268-279.

335 Testimony of Paul Tagliabue at 1-2.

been added.[336] During 1998-1999, Fox carried approximately 56 telecasts of NFL regular season games, 7 telecasts of NFC play-off games, and one of the two Super Bowls, which consisted of about 200 hours of programming.[337]

137. Only a small portion of the JSC programming on Fox is compensable as distant signal programming. During 1998-1999, nine out of ten Form 3 cable systems carried no Fox distant signal at all.[338] Approximately 230 Form 3 cable systems carried Fox stations from distant markets,[339] of which approximately 100 carried their only Fox station as a distant signal.[340] Thus, only about 4.2% of Form 3 systems carried Fox only as a distant signal in 1998,[341] and only 1.8% of Form 3 subscribers received Fox as a distant signal in 1998.[342]

138. Only about 40 of the 130 cable systems carrying Fox as both a distant and a local station would carry different NFL games on the different Fox stations on a regular basis, and 20-25 of these systems would carry different NFL games on a

---

336 Id. at 3-5. CBS acquired the rights to broadcast the AFC games beginning in 1998. Id. at 4.

337 Testimony of Paul Tagliabue at 4.

338 Tr. 176 (Tagliabue); NAB 1998-1999 Exhibit 1-X.

339 Tr. 135 (Tagliabue); Testimony of Paul Tagliabue at 5-6.

340 Tr. 135-136 (Tagliabue); Testimony of Paul Tagliabue at 5-6.

341 Tr. 177-178 (Tagliabue); NAB 1998-1999 Exhibit 1-X.

342 Id.

periodic basis.[343] Thus, a substantial amount of JSC programming on Fox distant signals would be duplicative of what was already on the local Fox signal.

139. The NFL licensed games to Fox on a national exclusive basis.[344] In 1993-1994, the Fox network still had broadcasting gaps in its national footprint.[345] NFL staff evaluated these coverage gaps, and addressed cable carriage with Fox as a way to resolve the problems.[346] The potential for receiving compulsory license royalties for games licensed to Fox rather than to another national broadcast network whose programming would be non-compensable was not a factor during the negotiation of the Fox-NFL contract.[347]

140. Even if there had been any value added to the JSC claim by the appearance of sporting events on the Fox network, all such changes would have been taken into account by the results of the Bortz survey. Mr. Trautman testified

---

343 Tr. 137-138 (Tagliabue).

344 Tr. 158 (Tagliabue)

345 Tr. 155-156 (Tagliabue).

346 Tr. 157-158 (Tagliabue).

347 Tr. 144-145 (Tagliabue).

that the value of sports programming to cable operators in 1998-1999 was essentially the same as it was in the 1990-1992 period.[348]

141. In any event, the value of any new JSC programming in 1998-1999 would only tend to counterbalance the substantial loss of value of the JSC claim since 1990-1992. This is reflected in the relatively constant JSC Bortz share from 1990-1992 to 1998-1999. The percentage of sports programming time in the distant signal universe changed only from 4.8% in 1992 to 4.9% in 1998-1999.[349] Mr. Trautman admitted that even though in his view the addition of certain sports added value to the JSC claim, there were many other factors also at work in the marketplace.[350]

142. Much of the basis for JSC's royalty claim in the 1990-1992 proceeding no longer existed in the 1998-1999 distant signal market. In their 1990-1992 proposed findings, JSC emphasized the changed circumstance resulting from the increased dominance of superstations in the distant signal marketplace.[351] They claimed that in terms of royalties paid, the superstations experienced a dramatic

---

348 Tr. 208 (Trautman).

349 NAB 1998-1999 Exhibit 10.

350 Tr. 580 (Trautman).

351 JSC 1990-1992 PF at ¶ 273-277.

increase from the prior proceeding.[352] JSC also asserted that sports programming was of central importance to the growth of superstations.[353] In this proceeding, by contrast, the relative importance of superstations has decreased radically. JSC cannot have it both ways. They cannot argue in one proceeding that the increased dominance of superstations should increase their claim, but in the next that the loss of the most significant superstation should have little to no effect on them.

143. JSC also asserted in their 1990-1992 proposed findings a changed circumstance resulting from the supposedly increased attractiveness of superstation sports.[354] Between 1990 and 1991, the Atlanta Braves came from behind to win the National League pennant during the last week of the season.[355] In 1992, the Braves repeated as National League Champions.[356] The Braves were promoted by WTBS as "America's team," and brought substantial value to the JSC royalty claim and award.[357] In the 1998-1999 period, by contrast, the important and attractive Braves games on WTBS were no longer part of JSC's claim in the distant signal

---

352 Id. at ¶ 274-275.

353 Id. at ¶¶ 277-280.

354 Id. at ¶ 278-280.

355 Id. at ¶ 279.

356 Id.

357 Id. at ¶ 5.

marketplace, and were now on a cable network, further diluting the value of games remaining on distant signals.

144. JSC emphasized that the Chicago Bulls were in the midst of winning three championships during the 1990-1992 time period.[358] They featured "perhaps the most famous athlete in the world," Michael Jordan.[359] By contrast, Michael Jordan was leaving and the Bulls were fading in 1998-1999.[360]

145. Paul Bortz testified in the 1990-1992 proceeding on behalf of JSC that the strong performance of the Braves and Bulls increased the importance and value of superstation sports between 1989 and 1992.[361]

(4) Regional Sports Networks

146. Regional sports networks posted huge gains in both programming and subscribers between 1992 and 1998 (43 million in 1992 to over 75 million in 1998).[362] Despite these huge increases, JSC claim that there was no cognizable

---

358 Id. at ¶ 280.

359 Id.

360 See discussion of WGN changes supra.

361 JSC 1990-1992 PF at ¶ 280; 1990-1992 Direct Testimony of JSC witness Paul Bortz, JSC June 16, 2003 Incorporated Testimony, Vol. 2 of 5 at Tab 2, p. 35.

362 Rebuttal Statement of Dr. Richard V. Ducey at 10-11.

"rise" in regional sports networks since the 1990-1992 proceeding.[363] In addition to the great increase in the number of subscribers who now have access to at least one regional sports network,[364] other national sports networks have debuted since the 1990-1992 proceeding.[365] JSC themselves recognize the substantial dilutive impact of such an increase in the number of competing games available through multiple cable networks.[366] Most cable systems carry both ESPN and ESPN2, which provide substantial amounts of sports programming.[367] ESPN2, which did not exist until 1993, carried MLB games, college football games, college basketball games, and other live sports programming during the 1998-1999 time period.[368]

147. All of the sports carried on distant signals were also available on cable networks during the 1998-1999 period.[369] JSC games were also available on broadcast networks, on satellite services such as DirecTV, and in the form of live sporting events.

---

363 JSC PF at ¶ 277.

364 In some areas, including Southern California, two regional sports networks were available to subscribers. NAB 1998-1999 Exhibit 52-RX.

365 PTV Ex. 2-R. (ESPN Classic debuted in May 1995.)

366 JSC PF at ¶ 279.

367 Tr. 542-543 (Trautman).

368 Tr. 1492-1493 (Travis).

369 Tr. 1488-1489 (Travis).

148. Numerous witnesses testified that the reach and coverage of regional sports networks increased dramatically from the 1990-92 to 1998-99 period.[370] They provided JSC programming comparable to what was available on over the air stations that were carried as regional distant signals.[371] JSC demonstrated this fact using three examples: KCAL, which carried games of the Anaheim Angels; KMSP, which carried games of the Minnesota Twins; and KTLA, which carried games of the Los Angeles Dodgers, all of which were carried as distant signals by a number of cable systems.[372]

149. KCAL carried 44 Anaheim Angels baseball games in 1998, while 40 Angels games were carried on a regional sports network, Fox Sports West.[373] Fox

---

370 Tr. 658 (Crandall) (The phenomenon of regional sports networks increasing in a significant way from 1992 to 1998); Tr. 1493 (Travis) (Regional sports networks would be experiencing subscriber growth between 1990-92 and 1998-99); Tr. 6033 (Allen) (A lot more regional sports networks existed in 1998 than in 1992); Tr. 6035 (Allen) (The rise of regional sports networks is a market change between 1992 and 1998); Tr. 6035 (Allen) (The existence of regional sports networks is a new factor that would have to be taken into account in making programming decisions in 1998).

371 Tr. 9844 (Fuller).

372 Tr. 9846-9854 (Fuller); JSC Ex. 61-RX.

373 Tr. 9857-9858 (Fuller): NAB 1998-1999 Exhibit 50-RX.

Sports West had four million subscribers in 1998, while KCAL had approximately 275,000 to 280,000 distant subscribers.[374]

150. Fox Sports West and Fox Sports West 2 had the cable rights to all six of the area sports teams in the 1998-1999 period: Los Angeles Kings, Anaheim Mighty Ducks, Anaheim Angels, Los Angeles Dodgers, Los Angeles Lakers, Los Angeles Clippers, as well as deals with UCLA and USC.[375] Fox Sports West 2, which carries Los Angeles Dodgers games, had approximately 2,800,000 subscribers in 1998.[376]

151. KMSP, the broadcast flagship of the Minnesota Twins, carried 15 games in 1998. The Midwest Sports Channel, a regional sports network, carried 105 Twins games during 1998.[377]

152. In all of the examples presented by JSC, the regional sports networks aired nearly as many or more games than their distant signal counterpart.[378]

---

374 Tr. 9858-9860 (Fuller); NAB 1998-1999 Exhibit 51-RX.

375 Tr. 9860 (Fuller); NAB 1998-1999 Exhibit 52-RX.

376 Tr. 9861-9862 (Fuller); NAB 1998-1999 Exhibit 51-RX.

377 Tr. 9863 (Fuller); NAB 1998-1999 Exhibit 50-RX.

378 Tr. 9864 (Fuller).

153. In 1992, broadcast networks carried 1,632 MLB games, with cable networks carrying 1,251, for a split of 58.1%/41.9% in favor of broadcast station carriage.[379] In 1998, broadcast stations carried 1,651 games (even with four teams added due to expansion), while cable networks carried 2,057 games, for a split of 44.5%/55.5%.[380] Thus, cable networks were not only greatly increasing the absolute number of games they carried, they also were becoming the dominant mode of carriage.

379 NAB 1998-1999 Exhibit 53-RX.

380 NAB 1998-1999 Exhibit 53-RX.

C. THE MUSIC CLAIMANTS

1. Music Claimants' Attempt to Apply a Benchmark of 4.5% Must Be Rejected

a. Use of the 1992 Settlement is Barred by the Stipulation

154. Music Claimants erroneously advocate the use of the 1991-1992 settlement, as incorporated in the "Stipulation of Settlement of Claim of the Music Claimants to the 1991 and 1992 Cable Royalty Funds" ("Stipulation") as a "reasonable reflection of the parties' assessment of the value of music in 1991-92."[381] They boldly misrepresent the settlement as "probative evidence of the other parties' perception that there had been no significant decline in music use or other changed circumstances between 1983 and 1991-92."[382]

155. As the Stipulation makes clear on its face, Music Claimants' 1991-1992 share reflects only a compromise agreement and does not reflect any concession by the settling parties as to the relative value of Music Claimants' works to cable

---

381 MC PF at ¶ 32.

382 Id.

operators.[383] The willingness to settle the 1991-1992 claim by the other Claimant groups provides no evidence whatsoever of the relative value of musical works in 1991-92.[384]

156. Neither the CRT nor the CARP has ever used past settlement amounts as benchmarks for awarding royalties in cable royalty distribution proceedings.[385] Rather, the CRT has considered only litigated awards as benchmarks in the course of determining changed circumstances.[386]

157. In setting Music Claimants' award, the Panel is not limited to relying on a changed circumstances analysis. As the D.C. Circuit has held, it would be improper, as a matter of law, to rely solely on such a standard, and the distribution determination must take into account new evidence "tending to show that past conclusions were incorrect."[387]

---

383 Statement of Peter Boyle at 7; Joint Motion for Declaratory Ruling Concerning the Benchmark for the Music Award, filed Feb. 6, 2003 ("Joint Motion") at 4-5.

384 Rebuttal testimony of Dr. George R. Schink at 7.

385 See Joint Motion at 7.

386 See id.

387 National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922, 932 (D.C. Cir. 1985).

158. New factual and marketplace evidence regarding the relative value of music used on cable, which was unavailable at the time of the last litigated Music award in 1983, establishes that the prior Music Claimants' 4.5% award was substantially overstated.[388] This evidence includes both Rate Court decisions and negotiated license agreements.

b. Rate Court Decisions and Negotiated License Agreements Provide an Accurate Measure of the Relative Marketplace Value of Music on Distant Signals

159. Music Claimants themselves advocate reliance on "[d]ecisions by ASCAP's Rate Court and evidence of market negotiations" in determining the relative market value of music use.[389] In this proceeding, as discussed below, there is new evidence proving that the relative market value of music was previously overstated. It is telling that, despite Music Claimants' acknowledgement that this extensive cable marketplace evidence is relevant, they chose to present none of it to the Panel as part of their direct case in this proceeding. Music Claimants' argument that their award should be based instead on shares they received in past distribution proceeding settlements[390] must be rejected.

---

388 NAB PF ¶ 209.

389 MC PF ¶ 223.

390 MC PF ¶¶ 73-76.

(1) The Interim Rate Decisions Consistently Support a Total Share for Music Claimants of Less than 0.9% of the Royalty Funds

160. As the Music Claimants explain, the Rate Court sets "reasonable rates" when parties are unable to reach a mutually acceptable agreement for the use of Music Claimants repertory of music.[391]

161. The Court in 1989 set an interim royalty rate for basic cable networks of 0.3% of each cable network's gross revenue.[392] For premium channels, the rate was set at $0.15 per subscriber per year, which was equivalent to 0.3% of the per-subscriber fees paid to the premium channels by the cable systems who carried them.[393] These interim rates were still in effect in 1998-1999, except for networks that had subsequently entered into negotiated license agreements.[394] For music-intensive networks, the court adopted a rate of 0.7%.[395] However, in 1991 the Court

---

391 MC PF ¶ 49. Whenever "ASCAP [and BMI] cannot reach agreement with a music user on the rate or fee for a performance license, a reasonable rate is determined" by a Rate Court.

392 Tr. 4738-4739 (Boyle); NAB Demo 12 at 6-7 & n. 8, 9. The last distribution proceeding in which a Music royalty share was litigated had been decided three years earlier. <u>1983 Cable Royalty Distribution Proceeding</u>, 51 Fed. Reg. 12792 (Apr. 15, 1986).

393 Tr. 4732-4738 (Boyle); NAB Demo 12 at 6-7 & n. 8, 9.

394 Tr. 4716-4718, 4762-4763 (Boyle).

395 Tr. 4741-4742 (Boyle); NAB Demo 12 at 6, 9.

set a lower rate of 0.2% for MSG since, as a sports network, it used a lower amount of music.[396] The court also implied that a similar reduced rate would also be set for news-oriented networks such as CNN and Headline News if empirical evidence was presented to demonstrate a lower level of music usage.[397]

162. For ASCAP, BMI and SESAC combined, those interim rates would total between 0.6% and 0.9% of the cable channel's gross revenue.[398]

163. Premium cable networks and distant signals are directly comparable in that neither type of service generates advertising revenues for cable operators or for themselves as a result of cable carriage.[399] For both, the sole source of revenue from cable carriage comes in the form of license fees paid by the cable operators. For distant signals, of course, these license fees are paid into the Copyright Office for distribution among copyright owners. Thus, the interim rates for premium networks, set at an amount equal to 0.3% of the license fees paid by the cable

---

396 Tr. 4788 (Boyle); NAB Demo 3.

397 Tr. 4742-4743 (Boyle); NAB Demo 13 at 2 n. 2. When the interim rate was later replaced by a negotiated license agreement, the CNN/Headline News networks paid a lower effective royalty rate than the general entertainment networks owned by the same company. Tr. 4717-4718 (Boyle).

398 See NAB PF ¶¶ 186-194.

399 Rebuttal Statement of Dr. Richard V. Ducey at 2.

operators, provide a direct guide for the percentage share that should be awarded to the Music Claimants.

(2) The Marketplace-Negotiated License Agreements Support a Combined Share of Less than 1%

164. Music Claimants also assert that, in the absence of a compulsory license, "the cable operators and the performing rights organizations would tend to negotiate an open marketplace rate consistent with their perception of the level of rates a rate court would establish."[400]

165. Music Claimants maintain that "[i]n determining Music's share, as well as in its other determinations, the CRT's objective has always been to 'simulate market valuation" through application of 'marketplace criteria.'"[401] The 1983 decision, they say, "reflected the CRT's judgment of the relative value Music would receive in an open market – that is, what the willing buyers (in this case the cable operators) would pay the willing sellers (in this case, the Music Claimants)."[402]

---

400 MC PF ¶ 71.

401 MC PF ¶ 221.

402 MC PF ¶ 221.

166. In the 1979 proceeding, the Music Claimants themselves had asserted that the "closest marketplace analogy available" was music's share of broadcasting programming expenses.[403] Now, as Music Claimants themselves admit, there is a more direct and reliable marketplace analogy available in the form of Rate Court decisions and actual marketplace negotiations. Yet the Music Claimants did not voluntarily present that evidence to the Panel.

167. To determine the marketplace value for music, Music Claimants contend that you "have to look at what the cable operators pay."[404] In particular, Music Claimants state that "ASCAP and BMI licensed cable operators at the annual rate of 8.3 cents per subscriber in 1998 and 1999 for music contained in their locally originated programming. These rates would also be taken into consideration in a market negotiation or rate proceeding to determine music license fees for the distant transmissions."[405] But these market-negotiated licenses with cable operators -- the only licenses that meet Music Claimants' preferred criterion--

403 MC 1979 PF at 4.

404 Tr. 8303 (MC Rebuttal Opening Statement).

405 MC PF ¶ 231.

represent a total license fee for all the music licensing societies for only 0.4% of cable operator revenues related to their music use.[406]

168. The best measure of marketplace value is a percentage of revenue.[407] Applying all of the direct marketplace evidence in the record to the total distant signal revenues – the cable royalty fund – results in a percentage share for Music Claimants of between 0.4% and 0.9%.

2. There Was No Increase in Music Use in Any Event

169. The music usage study is flawed in its design and execution and does not demonstrate any increase in music usage over either period of 1983 and 1998-1999 or 1991-1992 and 1998-1999.[408]

170. The station sample was not representative.[409] The dates selected for the study were also not representative.[410] And the study's use of average minutes of

---

406 NAB PF at ¶ 195.

407 Tr. 4719 (Boyle) (ASCAP "certainly prefer[s] revenue as a base" when negotiating licenses); Tr. 4723 (Boyle) ("Certainly, changes in economic circumstances, revenue, things like that come into play when we're sitting down at the bargaining table.").

408 NAB PF ¶ 185.

409 See Tr. 4296-4297 (Krupit).

410 Tr. 8522-8523 (Schink).

music per hour only across "matched" program hours does not establish any change in total music use.[411] Thus, it is impossible to assert that a statistically significant change in the use of music occurred between the two study periods.[412]

25. Relying on JSC's rebuttal testimony, Music Claimants for the first time argue that the 1989 music use studies (withdrawn before being litigated) provide a sort of "bridge" between the 1983 and 1991-1992 music studies, and "strongly suggest" that there was no decrease in music use between 1983 and 1991-1992.[413] But the fact remains that there is no record evidence that reliably compares music use between 1983 and 1998-1999.[414]

171. Music Claimants also for the first time set forth the argument that "between 1983 and 1989, feature uses of music increased by between 36.2 and 37.6%."[415] However, the feature uses of music were only examined for the top seven distant signals.[416] There was also no effort undertaken to examine whether uses of theme or background music had increased or decreased.

---

411 Tr. 4865-4867, 4875-4877 (Boyle); NAB 1998-1999 Exhibit 27-X; NAB Demo 14.

412 Tr. 8516-8517 (Schink).

413 MC PF ¶¶ 134-137.

414 See NAB PF at ¶¶ 183-186.

415 MC PF ¶ 137.

416 Testimony of Dr. George R. Schink at App. B at 12.

3. Differential Application of Music's Share

172. The record evidence supports the conclusions that news programs use less music than other program types[417] and that lower license fees are charged in the market for news channels than for general entertainment services.[418]

173. To account for the difference in use of music by news programs as opposed to the other claimant groups and to avoid taking Music's share "off the top," Dr. Schink's allocation methodology can also be applied to NAB's Bortz share to determine NAB's appropriate contribution to Music's share. NAB's adjusted Bortz share for 1998-1999 is at least 14.6%.[419] The news programming allocation would be .175 percentage points for every 1.0 percentage point allocated to other programming.[420] The .175 percentage points could then be used to calculate the amount NAB must contribute to Music Claimants' share.[421]

174. Using the approach followed by JSC,.[422] this would result in a deduction from the Commercial Television award for its allocable share for Music

---

417 See NAB PF at ¶¶ 201-202.

418 Tr. 4597-4598, 4716-4718, 4762-4763, 4765 (Boyle); JSC Ex. No. 38-X.

419 NAB PF at p. 159, Figure 2.

420 Tr. 8462-8463 (Schink).

421 Tr. 8462-8465 (Schink).

422 See generally JSC PF ¶ 446-448.

which would be less than 3 percent of Music's award.[423] In our proposed share calculations, we have followed the simpler approach of taking the Music share "off the top," but if the Music award were higher than 0.9% the difference in the net Commercial Television royalty would be more significant, and this alternative approach should be followed instead.

---

[423] The calculation would be as follows, using a 15% share for Commercial Television: $(15 \times 0.175)/((15 \times 0.175) + (85 \times 1)) = .03$. Id.

III. CONCLUSIONS

175. The allocation method followed by the Panel should be both fair and consistent. It should also provide awards that are within the zone of reasonableness created by the quantitative evidence in the record.

176. Both Joint Sports Claimants and Program Suppliers have provided proposed findings that are essentially no help to the Panel in achieving these goals. Each of them, by proposing shares for all parties except each other, only temporarily avoid the unpleasant implications of their allocation positions. When the "implied" share proposed by each of them for the other is considered, it becomes clear that neither has proposed a set of allocations that meet the standards of fairness and consistency.

177. JSC's proposed allocations imply roughly a 50% share for Program Suppliers. Such a share would be fundamentally inconsistent with JSC's purported approach, which would start with the Bortz shares and permit changes only where a "substantial record basis" demonstrates that a market value adjustment is necessary. But while JSC propose that the Panel award JSC their full Bortz share, and propose, without support, downward adjustments in the Bortz shares of Commercial Television and other parties, the implied share for Program Suppliers

would represent a staggering 13 point upward adjustment in its Bortz share. There is no evidence whatsoever to support such a premium for Program Suppliers. In fact, the overwhelming weight of the evidence supports a significant reduction in Program Suppliers award.

178. Similarly, Program Suppliers' implied proposed award for JSC is only roughly 13%, which would represent a 16 point reduction in their award as compared with 1990-1992, and nearly a 25 point reduction from their Bortz share. Again, the overwhelming weight of the record evidence would support an award to JSC of higher than 13%.

179. Where each of the allocation proposals of these two largest parties in the proceeding produce such irrational and unjustifiable results, they should be discounted entirely. Commercial Television, by contrast, has presented a proposed set of allocations,[424] based on the Bortz shares as adjusted for two methodological problems,[425] that are both fair and consistent, and produce award percentages for

---

424 NAB PF at 160-163.

425 JSC points out that Dr. Fairley's adjustments of the Bortz shares use unweighted Bortz numbers, which results in a somewhat higher starting point for Commercial Television. JSC PF at 187. NAB's share calculations could also be performed on the basis of weighted Bortz numbers, but neither JSC (which used a different method to calculate corrections) or Dr. Fairley

(continued...)

all parties that are supported by substantial record evidence and within the zone of reasonableness created by the quantitative evidence in the record.

180. Commercial Television claimants proposed the following shares for all the parties

	Proposed Percentage Shares for Basic Fund	Proposed Percentage Shares for 3.75 Fund
Program Suppliers	27.77%	30.95%
Joint Sports Claimants	42.80%	47.69%
Commercial TV	17.33%	19.31%
Public Television	8.49%	0.00%
Canadian	1.52%	0.24%
Devotional	1.19%	0.91%
Music	0.90%	0.90%
TOTAL	100.00%	100.00%

(...continued)

provided the data in the record from which such calculations could readily be made.

181. If the Panel were to decide not to apply the WGN adjustment,[426] the shares would be as follows:

	Proposed Percentage Shares for Basic Fund	Proposed Percentage Shares for 3.75 Fund
Program Suppliers	36.73%	40.72%
Joint Sports Claimants	36.28%	40.23%
Commercial TV	15.30%	16.97%
Public Television	8.20%	0.00%
Canadian	1.40%	0.27%
Devotional	1.19%	0.91%
Music	0.90%	0.90%
TOTAL	100.00%	100.00%

182. In brief summary, the following evidence in the 1998-1999 proceeding, along with a substantial additional amount of evidence, compels an increase in the Commercial Television award:

- The Commercial Television percentage share in the Nielsen viewing study doubled, from 7.5% to 14.7%, between 1990-1992 and 1998-1999.
- The Commercial Television share in the Bortz surveys increased from 13% to 14.8% between 1990-1992 and 1998-1999.

---

426 It is important and appropriate to make some adjustment to reflect the WGN issue identified by Dr. Fairley, however, given the significance of WGN as the sole remaining superstation and the magnitude of the increase in non-compensable syndicated programs on WGN. NAB PF at ¶ ¶ 25-26.

- The share of programming time in the distant signal marketplace represented by Commercial Television programming increased from 8.8% to 13.0% between 1990-1992 and 1998-1999.
- The percentage of non-superstation distant carriage "clustered" within 150 miles of the distant signal's home market increased from 86.3% in 1990 to 89.2% in 1998-1999.
- The new regression analysis performed by Dr. Rosston corroborated the results of the Bortz cable operator surveys.
- The Bortz cable operator surveys, the best and the most direct measure of relative marketplace value, as adjusted to address two methodological issues identified by Dr. Fairley produce a share for Commercial Television of 15.75% for 1998-1999.
- The elimination of WTBS and WWOR from the distant signal marketplace substantially changed the configuration, nature, and relative value of the various distant signal program categories in 1998-1999 compared with 1990-1992.

CERTIFICATE OF SERVICE

I, Michael Lazarus, hereby certify that, in accordance with the agreement of all Phase I parties regarding compliance with service requirements, I have caused copies of the foregoing "Reply Proposed Findings and Conclusions of Law of the Commercial Television Claimants" to be sent by electronic mail, in .PDF format, to all parties as specified below, with an asterisk by the name of the representative(s) of each party to whom the electronic mail was sent. I have further caused copies to be sent via hand delivery and/or Federal Express, as specified below, this 5th day of September, 2003 to the following:

ASCAP (FedEx)	(FedEx)
I. Fred Koenigsberg Carol A. Witschel* White & Case Stefan M. Mentzer 1155 Avenue of the Americas New York, NY 10036-2787	Joan M. McGivern* Samuel Mosenkis* ASCAP One Lincoln Plaza New York, NY 10023
BMI	(Hand Delivery)
Marvin L. Berenson Joseph DiMona* Judith M. Saffer Marc D. Ostrow Broadcast Music, Inc. 320 West 57th Street New York, NY 10019	Michael J. Remington* Philip J. Mause* Jeffrey Lopez Adam L. Barea Drinker Biddle & Reath LLP 1500 K Street, NW, Suite 1100 Washington, DC 20005
SESAC	(FedEx)
Patrick Collins SESAC, Inc. 55 Music Square East Nashville, TN 37203	John C. Beiter* Loeb & Loeb LLP 1906 Acklen Avenue Nashville, TN 37212
Canadian Claimants (Hand Delivery)	
L. Kendall Satterfield* Richard M. Volin* Finkelstein, Thompson & Loughram 1050 30th Street, NW Washington, DC 20007	

Public Television Claimants (Hand Delivery)	
Timothy Hester Ronald G. Dove* Covington & Burling 1201 Pennsylvania Ave., NW Washington, DC 20004-2401	Paul Greco* Public Broadcasting Service 1320 Braddock Place Alexandria, VA 22314
Program Suppliers (Hand Delivery)	
Gregory O. Olaniran* Michael E. Tucci Robert L. Eskay, Jr. Stinson Morrison Hecker LLP 1150 18th Street, NW Suite 800 Washington, DC 20036-3816	
Joint Sports Claimants	(Hand Delivery)
Thomas J. Ostertag General Counsel Office of the Commissioner of Baseball 245 Park Avenue New York, NY 10167	Robert Alan Garrett* Ronald A. Schechter James Cooper Christopher Winters* Jule L. Sigall Michele T. Dunlop Arnold & Porter 555 Twelfth Street, NW Washington, DC 20004-1206
Ritchie Thomas Judith Jurin Semo Squire, Sanders & Dempsey 1201 Pennsylvania Ave., NW Washington, DC 20004	Philip R. Hochberg Piper Rudnick LLP 901 Fifteenth Street, NW, Suite 700 Washington, DC 20005

Michael Lazarus